

① 89-1061

DEC 29 1989

No. \_\_\_\_\_

IN THE SUPREME COURT  
OF THE UNITED STATES

OCTOBER TERM, 1989

SEVENTH-DAY ADVENTIST CONGREGATIONAL CHURCH  
AND JOHN R. MARIK,

Petitioners,

v.

GENERAL CONFERENCE CORPORATION  
OF SEVENTH-DAY ADVENTISTS,

Respondent.

\_\_\_\_\_  
PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT  
OF APPEALS FOR THE NINTH CIRCUIT  
\_\_\_\_\_

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## QUESTIONS PRESENTED

1. Is the trademark and service mark "Seventh-day Adventist" invalid and void?
2. Were certain indispensable parties not joined to the cause of action?
- 3.- Should Court of Appeals have imposed sanctions against Respondent?
4. Was Contempt Order of District Court properly before Court of Appeals for decision, and was such order void?
5. Did Contempt Order of District Court result in the imposition of excessive fines and the infliction of cruel and unusual punishments?
6. Did Judgment of District Court result in the deprivation of property without due process of law?





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\_\_\_\_\_

Petitioners, Seventh-day Adventist Congregational Church and John R. Marik, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

1. OPINIONS BELOW

The opinion of the Court of Appeals, General Conference Corporation of Seventh-day Adventists v. Seventh-day Adventist Congregational Church and John R. Marik, No. 88-2506, is not yet reported. (App. A). The opinion of the Hawaii District Court, No. 87-0274, is not yet reported. (App. B).

## 2. JURISDICTION

The decision below issued on October 5, 1989. The jurisdiction of this Court is claimed under 28 U.S.C. Section 1254(1).

## 3. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves listed provisions of the United States Constitution which provide in relevant part:

### First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, . . ."

### Fifth Amendment

"[N]or be be deprived of life, liberty, or property, without due process of law; . . ."

### Eighth Amendment

"[N]or excessive fines imposed, nor cruel and unusual punishments inflicted."

### Fourteenth Amendment

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

The case also involves the following statutory provisions, the relevant part of the texts thereof being set forth in Appendix C: 15 U.S.C. Sec. 1051-1127, Hawaii Revised Statutes, Title 26, Sec. 480-2, 481-3, and 482-4.

## 4. STATEMENT OF THE CASE

### 4.1 Nature of the Case

This is an action for injunctive and declaratory relief arising under the laws of the United States and the laws of the State of Hawaii. Laws of the United States relevant are those relating to trademarks, servicemarks, false designation of origin and unfair competition, 15

U.S.C. Sec. 1051-1127 (known as the Lanham Act). Pertinent laws of the State of Hawaii are those relating to trademarks, servicemarks, tradenames, unfair competition, deceptive trade practices and false advertising, Title 26, Hawaii Revised Statutes, Sec. 480-2, 481-3 and 482-4. The Lanham Act, 15 U.S.C. Sec. 1051 et seq, particularly 15 U.S.C. Sec. 1121, and 28 U.S.C. Sec. 1331 and 1338(a), is the basis for the District Court's jurisdiction of the federal law claims for relief. Pendent jurisdiction of the District Court for claims under the laws of the State of Hawaii is pursuant to 28 U.S.C. Sec. 1338 (b). The basis for jurisdiction in the Court of Appeals is 15 U.S.C. Sec. 1121 and 28 U.S.C. Sec. 1291.

#### 4.2 Proceedings and Disposition in District Court and Court of Appeals

The Complaint was filed on April 9, 1987. An answer was filed on May 18, 1987. A Motion for Judgment on the Pleadings, or in the Alternative, Motion to Strike, of the Plaintiff was filed on July 15, 1987. Pursuant to such motion, a Judgment and Permanent Injunction was entered on December 8, 1987. A Motion to Set Aside the Judgment, along with related motions, was made on December 20, 1987. Such motion was denied by an order entered on March 16, 1988, and an appeal was made to the Circuit Court, notice of appeal being filed on April 7, 1988. Following appeal to the Circuit Court, the District Court entered an order on May 12, 1988, holding Defendants in contempt and assessing fines of \$500.00 per day, collectively and individually against Defendants, and ordering that a warrant be issued for the arrest of John R. Marik. The District Court also awarded plaintiff \$13,929.21 for attorneys' fees and costs in pursuing the contempt order. The Court of Appeals heard such appeal on May 11, 1989, and rendered an Opinion on October 5, 1989. Such Opinion reversed and remanded the case on the grounds that a Judgment on the pleadings is improper where a defendant either raises questions of material fact or presents affirmative defenses. It did not address the Order for contempt; it held that such order was not before the Court. It also denied that the "adjudicative facts" sought to be judicially noticed by the Court were in compliance with Federal Rule of Evidence 201. Further, it held: "Remaining points urged by defendants are without merit."

### 4.3 Statement of Facts

The Seventh-day Adventist Congregational Church, one of the Petitioners, is an independent congregational church in Hawaii, located on the island of Hawaii. Its pastor is John R. Marik, the other Petitioner. The worship services of the Seventh-day Adventist Congregational Church are conducted in a building on which is placed a sign reading: SEVENTH-DAY ADVENTIST CONGREGATIONAL CHURCH. This sign is used solely in connection with the religious activities of the Seventh-day Adventist Congregational Church, its primary purpose being to designate the location of the place where worship services are conducted and to extend an invitation to others who desire to join in such worship services. Each word of such sign is intricately interwoven with the religious beliefs of Petitioners, particularly the words "Seventh day Adventist."

Due to the nature of this case, it is impossible to appreciate the significance of the name "Seventh-day Adventist" and the circumstances which have resulted in this cause of action without a proper understanding of certain basic doctrinal beliefs of the parties to this law suit and their departures in practice. Accordingly, these are presented. The making of such presentation is so that Court may make an enlightened decision, giving due accord to justice and equity, and upholding and setting a standard of highest judicial integrity.

The word "Seventh-day" is used in the church sign of Petitioners to denote the fact that they worship on the Sabbath, sunset on Friday to sunset on Saturday, as explicitly commanded by God in His Fourth Commandment, Bible, Exodus 20:8-11, and that they keep God's Ten Commandments because the breaking of any one of them is considered as breaking them all. Bible, James 2:10. The word "Adventist" in the church name expresses their religious belief that the Second Advent of Jesus Christ is imminent. It also expresses that they have the "faith of Jesus," for He has promised "I will come again . . ." Bible, Rev. 14:12; Jn. 14:3. But, the name "Seventh-day Adventist" has even deeper significance; this is emphasized in the Seventh-day Adventist Encyclopedia, 1966 ed., p. 1179, where it is stated: "the popular explanation that the name was selected as denoting one who believes in the Second Advent and observes the seventh day is an oversimplification." One primary doctrine that it

emphasizes is that those who reverently, with the faith of Jesus, keep the Sabbath as a day of worship, along with the other Commandments, will bear the mark of God. In contrast to them, will be those that keep Sunday as a day of worship, violating the Commandments, and who will thus bear the "mark of the beast" and suffer severely when the "wrath of God" is poured out upon the earth unmixed with mercy. Bible, Rev. 14:9,10; 16:2.

The Respondent, General Conference Corporation of Seventh-day Adventists, is wholly owned, directly or indirectly, by the Seventh-day Adventist Church, whose governing body is the General Conference of Seventh-day Adventists, a non-incorporated legal entity. Many of the officers of the General Conference of Seventh-day Adventists are also officers of the General Conference Corporation of Seventh-day Adventists. The religious beliefs of the Seventh-day Adventist Church and its members acting as officers of the General Conference Corporation of Seventh-day Adventists, and those of the Seventh-day Adventist Congregational Church are almost identical. The main point of difference is that the Seventh-day Adventist Church now considers itself a hierarchical church, in practice, though it denominates itself as being "Representative," Seventh-day Adventist Church Manual, 1986 ed., p. 38, whereas the Seventh-day Adventist Congregational Church is a congregational church, as its name clearly indicates. Petitioners are not opposed to organization per se, but they are opposed to church organizations of a hierarchical type for they tend to place reliance on man instead of God. Certain television evangelists such as Jimmy Swaggart and Jim Bakker prove the pitfall. In various law suits the Seventh-day Adventist Church has alleged that it is a hierarchical organization.

The name "Seventh-day Adventist" was used to indicate those of a particular religious belief as early as 1844. In Early Writings, by Ellen G. White, a Seventh-day Adventist publication, it is stated in the prologue, p. xx: "Into their midst came a Seventh-day Baptist, Rachel Oakes, who distributed tracts setting forth the binding claims of the fourth commandment. Some in 1844 saw and accepted this Bible truth. One of their number, William Farnsworth, in a Sunday morning service, stood to his feet and declared that he intended to keep God's Sabbath of the fourth commandment. A dozen other joined him, taking their stand firmly on all of God's commandments. They were the first Seventh-day Adventists." (emphasis added). This

is verified from other sources, e.g. the New Werner Twentieth Century Edition of Encyclopedia Britannica, Vol. 25, 1905 ed., states at page 52: "ADVENTISTS. The general name of Adventists is applied to a group of six more or less cognate sects of the Christian church, originating and existing chiefly in the United States and Canada. . . . There are now six major divisions of the Adventist church, as follows: 1.- Evangelical Adventists. . . . 2.- Seventh Day Adventists. These formed a separate body in 1845. They observe the seventh day, Saturday, as the Sabbath, and believe in the present day gift of prophecy and the annihilation of the unsaved. 3.- Churches of God, or Age-to-Come Adventists. . . . 4.- Advent Christians. . . . 5.- The Church of God. . . . 6.- The Life and Advent Union." In The Encyclopedia of American Religions, 2nd ed., 1987, the "The Adventist Family" of Christianity, is divided into (1) "Sunday Adventists," (2) "Seventh-day Adventists," (3) "Church of God Adventists," (4) "Jehovah's Witness Groups," and (5) "Southcottites." Ibid. p. 431, 432, 436, 444, 456. "An Adventist general conference was held in Albany in 1845, but the movement, torn by controversy, proliferated into a number of bodies, such as the Advent Christian Church and the Church of God (Adventist). One stream of the movement adopted the Seventh-day (Saturday) observance of the Sabbath and eventually became known as the Seventh-day Adventist Church." A History of Churches in the United States and Canada, Robert T. Handy, 1977 ed., p. 195-196. "Seventh-Day Adventism originated about fifty years ago in the work of Mr. Miller, who set the time for the end of the world in 1843-4. Adding some doctrines to the original faith, Elder James White and wife in 1846 became the leaders of the Seventh-Day branch of Adventism. Their headquarters were at different times at Paris, Me., Saratoga, Oswego, and Rochester, N.Y. In 1855 they settled permanently at Battle Creek, Mich., which has remained the center of the work ever since." "Seventh-Day Adventism Renounced," D.M. Canright, 1889 ed. The Respondent claims a derived first use of the name "Seventh-day Adventist" as of 1860. At that time there were a number of congregational churches holding to the religious beliefs of both the Petitioners and Respondent which bore the name Seventh-day Adventist Church, as already noted. On May 21, 1863, the General Conference of Seventh day Adventists was organized, which consolidated many of these churches and has resulted in the present



hierarchical Seventh-day Adventist Church. Seventh-day Adventist Encyclopedia, 1966 ed., p. 435; The Westminster Dictionary of Church History, Jerald C. Brauer, 1971 ed., p. 764; The World Book Encyclopedia, Vol. 17, 1989 ed., p. 326. The name "Seventh-day Adventist" has been used in names of a number of other churches, i.e. Seventh-day Adventist Church, Reform Movement, and the Davidian Seventh-day Adventist Church. The Encyclopedia of American Religions, 2nd ed., J. Gordon Melton, 1987, p. 432-436. In fact, Respondent by its own admission acknowledges such fact for it asserts that on July 22, 1888, "Elder A.J. Cudney organized the nine charter members as the first S.D.A. Church in Hawaii." Respondent's Memorandum in Opposition to Petitioners' Motion to Set Aside and other motions, Exhibit 4, p. 1, Hawaii District Court, C.A. 87-0274 above referenced. That church was organized separate and apart from being a constituent member of the General Conference of Seventh-day Adventists, for the Hawaii Conference of Seventh-day Adventists was not even established until 1895. Seventh-day Adventist Yearbook 1988, p. 241.

The General Conference Corporation of Seventh-day Adventists, Respondent, secured a trademark and service mark of the name "Seventh-day Adventist," Registration No. 1,177,185, on November 10, 1981. On April 9, 1987, this suit was filed alleging, among other things, infringement of such trademark, and a copy of such trademark was attached as Exhibit B to the Complaint. The only fact shown in the Complaint to document the alleged trademark infringement and other claims made, was a picture of the church sign, "Seventh-day Adventist Congregational Church." No specific commercial activity of Petitioners of any kind was indicated. No reference was made to their buying, selling, exchanging, consigning, brokering, financing, manufacturing, fabricating, engineering, transporting, storing, handling, servicing, or dealing in any other manner with any specific commercial product or service in which the name "Seventh-day Adventist" was used.

Respondent had not registered as a corporation to do business in the State of Hawaii at any time prior to entering of Judgment. Activities of the Seventh-day Adventist Church are conducted in Hawaii through the Hawaii Conference of Seventh-day Adventists, a non incorporated legal entity, and various corporations, other than Respondent, such as the Castle Medical Center, a non-profit corpora-

tion, at Kailua, Hawaii. Seventh-day Adventist Yearbook 1988, p. 241, 495. Petitioners acted pro se in this case until after Judgment was rendered, John R. Marik acting individually for himself, and as an executive officer of the Seventh-day Adventist Congregational Church.

Pursuant to a hearing held on May 9, 1988, the District Court held that Petitioners were in contempt and fines assessed, and directed that a warrant for the arrest of John R. Marik be issued. An Order was so entered on May 12, 1988. Such Order remains unrescinded. A warrant for the arrest of John R. Marik has been outstanding for over nineteen months. On December 15, 1989, he was apprehended.

General Conference Corporation of Seventh-day Adventists has asserted in its Complaint and other documents filed in this case that it is the owner of the tradename, trademark, and servicemark "Seventh-day Adventist." It admits that "The General Conference Corporation of Seventh-day Adventists is a wholly owned, controlled and subordinate entity of the General Conference of Seventh day Adventists." (emphasis added) Last sentence of Page 3, Respondent's Memorandum in Opposition to Petitioners' Motion for Sanctions, C.A. Case No. 88-2506, above cited. On or about November 1, 1988, the North American Division of Seventh-day Adventists adopted a new policy relating to trademarks, NAD B 80, a copy of which was attached to Petitioners' Motion for Court to Take Judicial Notice of Assignment of Trademark, C.A. Case No. 88-2506, above cited, and is also set forth in the Appendix D hereof. In Section B 80 20 thereof it is provided: "It shall be the responsibility of the Trademark Committee to monitor and review any unauthorized use of the trademark, including recommendations to the General Conference Corporation with respect to any legal or other action that should be taken to protect the proprietary interests of the Church as well as its good name. Approval of the General Conference Officers shall be obtained prior to the implementation of any legal action." The Trademark Committee is a committee of the General Conference of Seventh-day Adventists, not of the General Conference Corporation of Seventh-day Adventists. Such corporation admits that the General Conference of Seventh day Adventists is "a 'related company' within the meaning of 15 U.S.C. Sec. 1127 and its use of the trademark/service mark 'Seventh-day Adventist.'" Sec. 5 of Affidavit attached to Respondent's Memorandum in

Opposition to Petitioners' Motion for Sanctions." Case No. 88-2506, cited above.

Petitioners continue to use their church sign reading "Seventh-day Adventist Congregational Church."

## 5. REASONS FOR GRANTING THE WRIT

5.1 The decision below which is neither constitutionally nor logically compelled, conflicts with the tenor of decisions of this and other lower federal courts concerning matters which may be judicially noticed, which are in violation of Constitutional rights of freedom of religion and speech, which constitute excessive fines imposed and cruel and unusual punishments inflicted, which amount to deprivation of property without due process of law, which require sanctions, and the jurisdiction of federal courts of appeal over orders ancillary to the judgment, such as a contempt order of a district court, and the scope of the relief which may be granted.

5.2 The decision below has so far deviated from the accepted and usual course of judicial proceedings, as noted above, and even been in conflict with its own decisions, as to call for an exercise of this Court's power of supervision in order that there be a symmetry in the law and not be an abuse of judicial discretion.

## 6. ARGUMENT

6.1 THE COURT BELOW HAS ERRED IN NOT HOLDING THE TRADEMARK AND SERVICE MARK "SEVENTH-ADVENTIST" INVALID AND VOID.

### 6.1.1 Judicial Notice

The Court of Appeals was specifically requested pursuant to the provisions of Rule 201(d) of the Federal Rules of Evidence (hereafter "FRE") to take judicial notice of adjudicative facts set forth in briefs and motions of Petitioners, and in particular as they were referenced in the Bible, Encyclopedias, Law Review articles, and other books and materials referenced in such documents, matters which may be readily verified. See *Brown v. Piper*, 91 U.S. 37, 42-43, 23 L.ed 200 (1875). "Adjudicative facts" were presented which are not subject to reasonable dispute, and therefore pursuant to FRE 201(d) it was

mandatory that the Court take judicial notice of them. *Brown v. Piper*, *Ibid.*, 10 Moore's Federal Practice, Sec. 201.40 (d).

FRE 201(f) specifies: "Judicial notice may be taken at any stage of the proceeding." It has been held that the rule of judicial notice applies to appellate courts, and they will generally take judicial notice of any matter which the court below could have judicially noticed. *United States v. Pink*, 315 U.S. 203, 86 L.Ed 796, 69 S.Ct 552 (1942); *Massachusetts v. Westcott*, 431 U.S. 322, 52 L.Ed.2d 349, 97 S.Ct 1755 (1977); *United States v. Dolan*, 544 F.2d 1219 (C.A. 4, 1976). For purposes of judicial notice, reference may be made to encyclopedias, textbooks, dictionaries, or other publications of established authenticity. *Werk v. Parker*, 249 U.S. 130, 63 L.Ed 514, 39 S.Ct 197 (1919); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (C.A. D.C., 1978). The pleadings in this case must be read in the light of the facts of which the Court takes judicial notice. *United States v. Lamont*, 236 F.2d 312 (C.A. 2, 1956). Judicial notice has been taken of economic and business matters in Federal courts. *Dayton Power & L. Co. v. Ohio Public Utilities Com.*, 292 U.S. 290, 78 L.ed 1267, 54 S.Ct 647 (1934); *Fox v. Kane Miller Corp.*, 398 F.Supp 609 (D.C. Md, 1975). Judicial notice has been taken of religious matters. Particular attention is directed to the Trademark Policy set forth Append. I. The dietary requirements of orthodox Jews has been judicially noticed. *United States v. Kahane*, 396 F.Supp 687 (ED NY, 1975). Matters of religious history are matters deemed subject to judicial notice, whether general or relating to a particular denomination. *Smith v. Pedigo*, 145 Ind. 361, 393, 33 N.E. 777 (Ind. Sup.Ct., 1893); *Hilton v. Roylance*, 25 Utah 129, 69 P. 660 (Utah Sup. Ct., 1902). The general doctrines and rules of each religious sect, and the distinction in belief between any sects is a proper subject of judicial notice. *Hilton v. Roylance*, *Ibid*, *Smith v. Pedigo*, *Ibid*. Expulsion practices of particular denominations have been judicially noticed. *Brayshaw v. Ridout*, 79 Md 454, 29 A. 515. See 20 A.L.R.2d 514, Sec. 28. Judicial notice has also been taken of the existence of many incorporated church societies. *Alden v. St. Peter*, 158 Ill 631, 42 N.E. 392 (Ill. Sup.Ct., 1895). A general discussion of the matter of judicial notice in Federal Courts is given in 12 Federal Procedure, Lawyer's Edition, Sec. 33.37-33.64. See also 29 Am.Jur.2d Evidence Sec. 14-78, and Mc Cormick on Evidence, 3rd ed, Lawyer's Ed., Chap. 35, "Judicial Notice."

### 6.1.2 Genericness

Generic terms cannot be trademarked. *Holzapfel's Compositions Co. v. Rahtjen's American Composition Co.*, 183 U.S. 1, 46 L.ed 49, 22 S.Ct 6 (1901); *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U.S. 598, 32 L.Ed 535, 9 S.Ct 166 (1888); Trademarks and Unfair Competition, 2nd. ed., J. Thomas Mc Carthy, Chap. 12, "Generic Terms," p. 519 et seq. Genericness may be evidenced by: (1) Generic use by competitor not contested by trademark registrant. (2) Generic use by trademark registrant. (3) Dictionary definitions. and (4) Generic use by trade journals, encyclopedias, and other media. Ibid. p. 528-529. It is particularly noted that Respondent has not contested the use of Seventh-day Adventist by the Seventh day Adventist Church, Reform Movement, which has numerous churches in the United States and in foreign countries. Neither have they contested the use of such name by the Davidian Seventh-day Adventists Association. See Transcript of Proceedings of Hearing on May 11, 1989, of United States Ninth Circuit Court of Appeals in this case, C.A. 88-2506, p. 33. The General Conference of Seventh-day Adventists, in a book published by them, from whom Respondent has a derived use, has used the name "Seventh day Adventist" in a generic sense as noted above in the prologue, p. xx, of Early Writings, E.G. White, where in referring to a church organized in 1844 it stated: "They were the first Seventh-day Adventists." Additionally, Respondent itself calls a church not a part of the General Conference of Seventh-day Adventists or Respondent, an "S.D.A.," or "Seventh-day Adventist" Church, namely the first "S.D.A." Church in Hawaii, as above noted. Dictionaries have used the name "Seventh day Adventist" in a generic sense. Universal Dictionary of the English Language, Robert Hunter and Charles Morris, 1897 ed.; A New Dictionary on Historical Principles, Henry Bradley, 1914 ed.; Webster's New International Dictionary, Third Ed., 1958, p. 38. The name "Seventh-day Adventist" has been used by the media in a generic sense. The Encyclopedia of American Religions, 2nd. ed., 1987, J. Gordon Melton, p. 77-85, 432, 436; The Encyclopedia Americana, Vol. 24, 1972 ed., p. 620; The Westminster Dictionary of Church History, Jerald C. Brauer, 1971, p. 763-764; A History of Churches in the United States and Canada, Robert T. Handy, 1977 ed., p. 194-195, 294, 374; Seventh-

Day Adventism Renounced, D.M. Canright, 1889 ed., p. 25-36. Thus, it is manifest, based on matters that may be judicially noticed, as above noted, that the name "Seventh-day Adventist" is generic.

The facts in this case are very similar to that of *Christian Science Bd of Directors v. Evans et al*, 105 N.J. 297, 520 A.2d 1347 (N.J. 1987). In the *Christian Science* case the religion had its origin in 1866. It became an organized religion in 1879. The defendants in that case disassociated themselves from the First Church of Christ, Scientist and formed their own church, using the name "Independent Christian Science Church of Plainfield, New Jersey." The First Church of Christ, Scientist obtained a trademark and service mark of the names "Christian Science" and "Church of Christ, Scientist" under the Lanham Trademark Act, 15 U.S.C. Sec. 1051-1127, and brought suit to enjoin continued use of such names by defendants. The Court in that case, 520 A.2d 1347, 1352, 1353, held that "'Christian Science Churches' is a generic name for churches in which Christian Science is practiced.", and "the term 'Christian Science Church' is not entitled to trademark status." It further held, *Ibid* p. 1354, that "Because we have concluded that 'Christian Science Church' is generic and not descriptive, any secondary meaning shown by plaintiffs is no avail to them." (emphasis added). Note the similarities of that case and this case: (1) both religions had their origin prior to their organization, (2) prior to the organization there were a number of such churches practicing such religion using a name which included that part thereof which was later trademarked and service marked, (3) the name of each was vitally associated with the religion, (4) plaintiff and defendants in each case practiced the same religion, (5) a trademark and service mark was in each case obtained under the Lanham Trademark Act, and (6) an injunction was sought in each case to prohibit further use of the name trademarked and service marked. The Court in the *Christian Science* case, *Ibid*, p. 1351, appropriately held: ". . . the law has come to recognize: (1) because 'Christian Science' is the name of a religion, anyone practicing . . . 'Christian Science' can use that phrase in the name of a church; (2) because defendants practice the Christian Science religion (as plaintiffs readily acknowledge), they are entitled to use 'Christian Science' in the name of their church." Generic names are not subject to trademark. *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 83 L.Ed 73, 59 S.Ct 109 (1938).

### 6.1.3 Freedom of Religion and Speech

In *Supreme Lodge Knights of Pythias v. Improved Order Knights of Pythias*, 113 Mich. 133, 136, 71 N.W. 470, 471 (1897) a fundamental proposition was noted: "Nearly all our varieties of churches of the same denomination are the results of secession or withdrawals from the parent church of that name, and it has been the usual course for the new church to adopt as a permanent part of its name the name of the parent organization." This principle was acknowledged in *Mc Daniel v. Mirza Ahmad Sohab*, 27 N.Y.S.2d 525 (Sup.Ct.), aff'd 262 A.D. 838, 290 N.Y.S.2d 509 (1941) where the Court held as page 527: "The plaintiffs have no right to a monopoly of the name of a religion. The defendants, who purport to be members of the same religion, have an equal right to use the name of the religion in connection with their own meetings, lectures, classes and other activities. . . . Defendants have the absolute right to practice Baha'ism, to conduct meetings, collect funds and sell literature in connection therewith, and to conduct a book shop under the title 'Bahia Book Shop.'" A similar approach has been adopted in other cases: *New Thought Church v. Chapin*, 159 A.D. 723, 144 N.Y.S. 1026 (1913); *Board of Provincial Elders of the Moravian Church v. Jones*, 273 N.C. 174, 159 S.E.2d 545 (1968); *Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church*, 39 Cal.2d 121, 245 P.2d 481 (1952), cert den 345 U.S. 938, 97 L.Ed1365, 73 S.Ct 828 (1953). Each of the above cases clearly indicate that the name is closely tied with the religion and entitled to appropriation by a group holding the same religion. It is thus a fundamental right and constituent part of freedom of religion subject to protection under the First and Fourteenth Amendments of the U.S. Constitution. See *Charities, Churches - Name Protection*, 37 A.L.R.3d 277.

Petitioners are entitled to use a sign to announce their religious services as a part of their freedom of speech under the First and Fourteenth Amendments to the U.S. Constitution. *Girl Scouts of United States v. Personality Posters Mfg. Co.*, 304 F.Supp 1228 (SDNY, 1969). *Brown Chem. Co. v. Meyher*, 139 U.S. 540, 35 L.Ed. 247, 11 S.Ct 625 (1891); *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U.S. 118, 49 L.Ed 972, 25 S.Ct 609 (1905); *Thomas v. Board of Ed., Granville Cent. Sch. Dist.*, 607 F.2d 1043 (C.A. 2,



1979), cert den 444 U.S. 1081, 62 L.Ed 765, 100 S.Ct 1034. Where property rights are juxtaposed with the right of freedom of speech, the latter occupies the preferred position. *Marsh v. State of Alabama*, 326 U.S. 501, 90 L.Ed 265, 66 S.Ct 276 (1946).

#### 6.1.4 Establishment of Religion

In *The Encyclopedia of American Religions*, 2nd Ed., J. Gordon Melton, 1987, p. 432-435, there are listed four churches bearing the name "Seventh-day Adventist" or "S.D.A." in their titles, other than the Seventh-day Adventist Church, which is also listed. One of these churches, Seventh-day Adventist, Reform Movement, had its origin in 1914 as a result of their members being disfellowshipped from the Seventh-day Adventist Church for refusing to bear arms in violation of the commandment "Thou shalt not kill." As already noted, the name "Seventh-day Adventist" is intimately connected with these religious groups. Consequently, to allow one of them to the exclusion of the others to use the name "Seventh-day Adventist" based on laws of the United States would be to advance that religion, and inhibit the others. This would be in violation of the Establishment Clause of the First Amendment of the United State Constitution which states: "Congress shall make no law respecting an establishment of religion. . ." Under the Fourteenth Amendment, this "fundamental Concept of liberty" is also applicable to the States. *Cantwell v. Connecticut*, 310 U.S. 296, 303, 84 L.Ed 1213, 60 S.Ct 900, 903 (1940). The Court in *Edwards v. Aguillard*, \_\_\_ U.S. \_\_\_, 96 L.Ed.2d 510, 107 S.Ct 2573 (1987) applied a three-pronged test for determining whether there was compliance with the Establishment Clause: "First, the legislature must have adopted the law with a secular purpose. Second, the statute's principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement of government with religion." To contrive the Lanham Trademark Act so that Respondent is entitled to a a trademark of the name "Seventh-day Adventist," would most definitely advance one religion, and inhibit other religions. Thus, based on a non-compliance with the second prong of the three-pronged test, there would be a violation of religious liberty, contrary to the provisions of the First and Fourteenth Amendments of the United States Constitution. *Lemon v. Kurtzman*, 403 U.S. 602, 29 L.Ed.2d 745, 91 S.Ct 2105 (1971). The special context out of which this



controversy arose must be given due consideration, particularly its historical context which may be judicially noticed. *Bethel School District No. 403 v. Fraser*, \_\_\_ U.S. \_\_\_, 92 L.Ed.2d 549, 106 S.Ct 3159 (1986).

#### 6.1.5 Ownership of Trademark and Service Mark

Respondent has asserted in its Complaint and other documents in this case, C.A. No. 87 0274, that it is the owner of the tradename, trademark, and servicemark "Seventh-day Adventist." It admits that "The General Conference Corporation of Seventh-day Adventists is a wholly owned, controlled and subordinate entity of the General Conference of Seventh day Adventists," (emphasis added). Page 3, Respondent's Memorandum in Opposition to Petitioners' Motion for Sanctions, Case No. 88-2506, above cited. On or about November 1, 1988, the North American Division of Seventh-day Adventists adopted a new trademark policy, NAD B 80, a copy of which was attached to Petitioners' Motion for Court to Take Judicial Notice of Assignment of Trademark, Case No. 88-2506, above cited, and is also set forth in the Appendix I hereof. In Section B 80 20 thereof it is provided: "It shall be the responsibility of the Trademark Committee to monitor and review any unauthorized use of the trademark, including recommendations to the General Conference Corporation with respect to any legal or other action that should be taken to protect the proprietary interests of the Church as well as its good name. Approval of the General Conference Officers shall be obtained prior to the implementation of any legal action." The Trademark Committee is a committee of the General Conference of Seventh-day Adventists, not of Respondent, General Conference Corporation of Seventh-day Adventists. Such corporation admits that the General Conference of Seventh day Adventists, is a "related company" within the meaning of 15 U.S.C. Sec. 1127" and that such conference, not Respondent, supervises and controls the use of the trademark/service mark "Seventh-day Adventist" by the Pacific Union Conference of Seventh-day Adventists and the Hawaii Conference of Seventh-day Adventists. Sec. 5 of Affidavit attached to Respondent's Memorandum in Opposition to Petitioners' Motion for Sanctions." Case No. 88-2506, cited above. In PTO Trademark Manual of Examining Procedure, Sec. 1201.02(b) it is provided: "In a related company situation, the party who controls the nature and

quality of the goods or services with which the mark is used and who is thereby the owner of the mark, should be set out in the application as the applicant." Here is a clear statement that the one who controls the nature and quality of the goods with which the mark is used, is the owner of the mark, regardless of who may hold legal title, and is the appropriate one to make application for the trademark and service mark. In this regard the following should be noted: (1) the Trademark Policy NAB 80 places legal title in Respondent, Sec. B 80 10 and B 80 30 of policy, in a similar manner as would a deed of trust place legal title in trustee, leaving the equitable title and possession and control in the trustor, (2) the General Conference of Seventh-day Adventists, through its Trademark Committee, monitors and reviews any unauthorized use of trademarks, Sec. B 80 20 of policy, (3) such committee makes recommendations to Respondent regarding any legal or other action that should be taken with regard to trademarks, service marks, or trade name, (4) no legal action shall be conducted by Respondent with regard to such matters without approval of such Trademark Committee, (5) Respondent admits that it is controlled by General Conference of Seventh day Adventists, (6) Respondent admits that the General Conference of Seventh-day Adventists is a "related company" within meaning of 15 U.S.C. Sec. 1127, and (7) Respondent neither directly nor indirectly controls the Pacific Union Conference of Seventh-day Adventists or Hawaii Conference of Seventh-day Adventists, and therefore they are not a "related company" within the meaning of 15 U.S.C. Sec. 1127, (8) Respondent, at the time judgment was entered in this case, had no operations in Hawaii, and was not even authorized to do business there, (9) prior to commencement of this action, initial correspondence with Petitioners regarding trademark infringement of the name "Seventh day Adventist" was initiated by a member of the Trademark Committee of the General Conference of Seventh-day Adventists, not Respondent, and (10) Justice Brennan, speaking for the majority of the Court on the point, observed that "the parent corporation - not the subsidiary whose every decision it controls - better fits the bill as the true owner of any property that the subsidiary nominally possesses." *K Mart Corp. v. Cartier, Inc.*, \_\_\_ U.S. \_\_\_, 100 L.ed.2d 313, 108 S.Ct 1811, 1821 (1988), citing *I J. Mc Carthy, Trademarks and Unfair Competition*, 748 (2d ed, 1984). Considering the matters above specified, the General Conference of Seventh-day Adventists and not

Respondent is the owner of any trademark and service mark of the name "Seventh-day Adventist," and should have made application for its registration, not Respondent. The comments in Trademarks and Unfair Competition, J. Thomas Mc Carthy 2nd. Ed., 1984, Sec. 18.16 at page 839 are appropriate: "The Lanham Act definition of 'related company' is awkwardly worded in that it contains the phrase 'any person who legitimately controls . . .the registrant'. This could be read to mean that licensees could control the licensor-registrant. But this would be an absurd reading, totally contrary to the whole rationale of licensing and the PTO does not so read the Act." Judge Nies, concurring in *In Re Wella A.G.*, 787 F.2d 1549 (Fed. Cir. 1986) states: "Regardless of their being related companies, only one is the owner. Whether the relationship is that of licensor/ licensee or parent/subsidiary, the one entity which controls the nature and quality of the goods sold under the mark is the owner. See J. Mc Carthy, *supra*, Sec. 18.14, p. 830; Trademark Manual of Examining Procedure, Sec. 1201.01 et seq." In this case, the Respondent, General Conference Corporation of Seventh-day Adventists, admits that it is the General Conference of Seventh-day Adventists who controls the nature and quality of the goods sold under the mark, as already noted. Accordingly, the General Conference of Seventh-day Adventists is the owner of the trademark and service mark "Seventh-day Adventist." Under Section 1 of the Lanham Act, 15 U.S.C. Sec.1051, it is only the owner of a mark who is entitled to apply for registration. In *In Re Wella A.G.*, *Ibid.*, it was stated in the concurring opinion of Judge Nies: "If one who is not the owner seeks registration, the application must be denied and any registration which issues is invalid." In support Judge Nies cited *Smith v. Tobacco By-Products & Chemical Corp.*, 243 F.2d 188, 44 CC Pa 880, 113 USPQ 339 (1957); J. Mc Carthy, *Trademarks and Unfair Competition* Sec. 16:14, 19:14 (2d ed. 1984); E. Vandenburg, *Trademark Law and Procedure* Sec. 10.11(b) (2d ed. 1968): 37 C.F.R. 2.33 (1985). In a subsequent appeal of this case after remand, following a decision in *In re Wella A.G.* 5 USPQ2d 1359 (1987), the opinion of Judge Nies was not disturbed. *In Re Wella*, 858 F.2d 725 (Fed. Cir. 1988). Thus, by the General Conference Corporation of Seventh-day Adventists' own admissions, the trademark and service mark of the name "Seventh-day Adventist" is invalid. Accordingly, there is a lack of subject matter jurisdiction, and Petitioners'

assertions in this case that there was fraud perpetrated in the presentation of an application for such trademark and service mark by Respondent are confirmed, for there was a knowing misrepresentation made, with the deliberate intent to deceive, for on numerous occasions such party has asserted that it is owner of such trademark. This is corroborated by Respondent's Application for the trademark and service mark of the name "Seventh-day Adventist," Append. E. It contains no mention of a first use by a predecessor in title, or by a related company, or to uses by others which inure to the benefit of applicant, as required by 37 C.F.R. Sec. 2.38. This also confirms Petitioners' assertion that the General Conference of Seventh-day Adventists was an indispensable party to this action. Further, it evidences that Respondent has come with "unclean hands," as contended, and in addition to not being entitled to relief, should have sanctions imposed against it.

## 6.2 THE COURT BELOW ERRED IN NOT HOLDING CERTAIN ENTITIES TO BE PARTIES WHICH WERE INDISPENSABLE TO CAUSE OF ACTION

The interrelation between Respondent and the General Conference of Seventh-day Adventists as evidenced by the Trademark Policy NAD B 80, above noted, make it indisputably manifest that the General Conference of Seventh-day Adventists is an indispensable party to this cause of action.

Respondent alleged in its Complaint, Sec. 9, that it has "a membership in excess of four and one-half million." The Encyclopedia of American Religions, Second Ed., J. Gordon Melton (1987) lists only one Seventh-day Adventist Church as having a membership of over four million members, and that is the General Conference of Seventh-day Adventists, a non-incorporated entity. The Hawaii Conference of Seventh-day Adventists, a non-incorporated entity, is a subordinate entity of such organization. In all pleadings prior to Judgment, and in the Judgment in this cause of action, the Respondent was shown in the style of the case as "GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS." In Section I of the Complaint the statement is made: "Plaintiff, General Conference Corporation of Seventh-day Adventists, is a corporation duly organized and existing under and by virtue of the laws of the District of Columbia with its principal place of business

at 6840 Eastern Avenue N.W., Washington, D.C., 20012." Nevertheless, Respondent tries to contend that the actions of the Hawaii Conference of Seventh-day Adventists and the General Conference of Seventh-day Adventists are the actions of the Respondent. See Sec. 8 of Complaint. Respondent is not even qualified to do business in the State of Hawaii, as noted above, nor is it qualified to do business "worldwide" in every country in which there is a Seventh-day Adventist Church. Respondents themselves recognize this deficiency in their pleadings, and even try to make a defacto correction by pseudo adding them. Note that in Memorandum in Opposition to Motion to Set Aside Judgment, C.A. 87 0274, above noted, the style of the case shows Respondent as "Plaintiffs" (note plural), and on p. 1 plaintiff is defined as "GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS," and on p. 2 plaintiff is defined as "General Conference of Seventh-day Adventist." Further, in Exhibits 4,5,6, & 7 of such memorandum, actions are shown of the Hawaii Conference of Seventh day Adventists, not of Respondent. In fact, all of page 1 such such Exhibit 4 relates to incidents occurring prior to the incorporation of Respondent. Further, Respondent, as noted before, is not qualified to do business in Hawaii. Neither can Respondent claim actions by the Hawaii Conference of Seventh day Adventists for its own benefit as a "related company" for such conference is not a "related company" as above noted.

Although FRCP 19 prescribes when a party is indispensable, there is no set formula for determining in every case whether an entity is an indispensable party or not. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 19 L.Ed.2d 936, 88 S.Ct 733, 11 FR Serv.2d 400 (1968). "An indispensable party is one whose relationship to the matter in controversy in a suit in equity is such that no effective decree can be entered without affecting his rights." *Hilton v. Atlantic Refining Company*, 327 F.2d 217 (C.A. 5, 1964). Certainly that is the situation here. Lacking indispensable parties, the cause of action must utterly fail.

### 6.3 THE COURT BELOW ERRED IN NOT IMPOSING SANCTIONS AGAINST RESPONDENT.

It has been previously mentioned that sanctions should have been imposed against Respondent for making an improper application for a trademark of the name "Seventh-day Adventist" because it was not

the owner of such name since it did not have requisite control.

Petitioners filed a Motion for Sanctions against Respondent for misrepresentations made by Respondent in Memorandum in Opposition to Petitioners' Motion for Court to Take Judicial Notice of Assignment of Trademark, C.A. 88-2506, above noted, reference to which is made. Respondent then filed a Memorandum in Opposition, and Petitioners filed Memorandum in Reply, reference to which is made. Such misrepresentations included (1) use of specifically defined term "General Conference" to refer to both Respondent and General Conference of Seventh-day Adventists, (2) indicating that the General Conference of Seventh-day Adventists is an incorporated entity, (3) indicating that ownership of name "Seventh-day Adventists" vested in Respondent in 1860, whereas Respondent was not incorporated until 1904, (4) indicating that there was a licensed use and not a joint use of the name "Seventh-day Adventists," (5) indicating that the Hawaii Conference of Seventh-day Adventists was a union conference and not a local conference, (6) indicating that the Hawaii Conference of Seventh-day Adventists was a "related company" within the meaning of 15 U.S.C. Section 1127, (7) indicating that provisions of Trademark Policy NAD B 80, above referenced, gave Respondent the legal right of ownership and enforcement of trademarks of the General Conference of Seventh-day Adventists, (8) indicating that a transfer of trademarks rights of name "Seventh-day Adventists" to Respondent occurred prior to filing of Complaint, (9) indicating the actions by North American Division of Seventh-day Adventists were those of Respondent, and (10) indicating the Trademark Policy B 80, above noted, formalized existing trademark policies and procedures. Such misrepresentations have been so numerous and so gross, that a clear intent is revealed to deceive both the Court and the Petitioners, and accordingly sanctions are warranted against Respondent. In failing to apply such sanctions, the Court below encourages improper judicial procedure, which can only lead to chaos.

**6.4 THE COURT BELOW HAS ERRED IN NOT HOLDING THAT THE CONTEMPT ORDER OF THE DISTRICT COURT WAS BEFORE THE COURT FOR DECISION, AND THAT SUCH ORDER WAS VOID AND OF NO FORCE AND EFFECT, AND ORDERING A RECISION OF THE WARRANT**

## FOR ARREST OF JOHN R. MARIK.

The contempt order of the District Court was properly before the Court of Appeals. An order of civil contempt is reviewable on an appeal taken from the final judgment in the suit out of which the contempt proceedings arose. *Fox v. Capital Co.*, 299 U.S. 105, 81 L.Ed. 67, 57 S.Ct. 57 (1936); *Hayes v. Fischer*, 102 U.S. 121, 26 L.Ed. 95 (1880); *Duell v. Duell*, 178 F.2d 683 (C.A. D.C., 1949); *Hodgson v. Mahoney*, 460 F.2d 326 (C.A. 1, 1972); *United States v. Johnson*, 801 F.2d 597 (C.A. 2, 1986); *Christensen Engineering Co. v. Westinghouse A.B. Co.*, 129 F. 96 (C.A. 2, 1904); *Halderman v. Pennhurst State School & Hospital*, 673 F.2d 628 (C.A. 3, 1982); *Cromaglass Corp. v. Ferm*, 500 F.2d 601 (C.A. 3); *Carbon Fuel Co. v. United Mine Workers of Amer.*, 517 F.2d 1348 (C.A. 4, 1975); *Drummond Co. v. District 20, United Mine Wkrs.*, 598 F.2d 381 (C.A. 5, 1979); *Southern Railway Company v. Lanham*, 403 F.2d 119 (C.A. 5 [GA, now 11], 1968); *Peabody Coal Co. v. Local U. Nos. 1734, 1508 & 1548, U.M.W.*, 484 F.2d 78 (C.A. 6, 1973); *Re Manufacturers Trading Corp.*, 194 F.2d 948 (C.A. 6, 1952); *Hultberg v. Anderson*, 214 F. 349 (C.A. 7, 1913); *Flat Slab Patents Co. v. Turner*, 285 F. 257 (C.A. 8, 1922), cert. den. 262 U.S. 752, 67 L.Ed 1215, 43 S.Ct 700; *Clay v. Waters*, 178 F. 385 (C.A. 8, 1910); *Thomassen v. U.S.*, 835 F.2d 727 (C.A. 9, 1987); *Union of Prof. Airmen v. Alaska Aeronautical*, 625 F.2d 881 (C.A. 9, 1980); *Hyde Construction Company v. Koehring Company*, 348 F.2d 643 (C.A. 10, 1965); *Appealability of Contempt Adjudication or Conviction*, 33 A.L.R.3d 448, Sec. 23; 9 Moore's Federal Practice Sec. 110.13 [4]. Thus, until the present case, there was unanimity in all federal circuit courts with regard to the review of a civil contempt order on appeal of a judgment out of which the civil contempt proceeding arose. No basis has been presented whatsoever for a change in procedure. Accordingly, there has been a denial of procedural due process of law contrary to the provisions of the Fifth and Fourteenth Amendments of the United States Constitution. A civil contempt order is an interlocutory order, a part of the underlying civil action. *Union of Prof. Airmen v. Alaska Aeronautical*, 625 F.2d 881, 883 (C.A. 9, 1980). Accordingly, there was a proper appeal from the Contempt Order. Also, the Judgment of the District Court having been reversed and remanded, the Contempt Order should have been



held void and of no further force and effect, and the order for the warrant of arrest of John R. Marik rescinded.

**6.5 THE COURT BELOW ERRED IN NOT HOLDING THAT THE CONTEMPT ORDER RESULTED IN THE IMPOSITION OF EXCESSIVE FINES AND INFLICTION OF CRUEL AND UNUSUAL PUNISHMENTS**

Fines have been assessed in excess of \$290,000.00 against Petitioners and a warrant for the arrest of John R. Marik was outstanding until his arrest on December 15, 1989. Additional fines are accumulating daily, and John R. Marik's liberty remains restrained, even though the United States Ninth Circuit Court of Appeals, Case No. 88 2506, has reversed and remanded the District Court's decision. It is abundantly manifest that such fines and restriction of liberty constitute "excessive fines" imposed, and "cruel and unusual punishments inflicted" contrary to the provisions of the Eighth Amendment of the Constitution of the United States. Congress has voiced its views regarding "cruel and unusual punishments inflicted" for civil contempt jailings by passing a bill to protest against civil contempt child-custody jailings. President George Bush signed such bill on September 23, 1989. It sets a cap of 12 months on civil contempt jailings. "Bush signs bill to free jailed mom," Houston Chronicle, Sept. 24, 1989. A protest against a violation of religious liberty and freedom of speech has just as far reaching implications as does a protest against child molestation. Such was the protest of Dr. Elizabeth Morgan which prompted the passing of the aforementioned bill. Restrictions of liberty in this case exceed the twelve month cap set by such bill.

**6.6 THE COURT BELOW ERRED IN NOT HOLDING THAT THERE HAD BEEN A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW**

The Contempt Order issued by the District Court below, C.A. 87-0274, assesses fines based on non-compliance with issued injunction which required in part as follows:

"DEFENDANTS ARE HEREBY ORDERED: (a) to deliver up to Plaintiff for destruction all labels, signs, prints, advertising materials, literature, packages, wrappers and other materi-



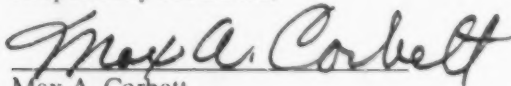
als in the possession or custody of Defendants, or any of them, or under their control, bearing the term 'SEVENTH-DAY ADVENTIST', ..."

The language of this provision is sufficiently broad to cover materials which have been properly acquired by Petitioners for valuable consideration which bears the name "Seventh-day Adventist." Inasmuch as Petitioners have such materials in their possession, to deprive them thereof without just compensation, amounts to a deprivation of property without due process of law, contrary to the provisions of the Fifth and Fourteenth Amendments of the United States Constitution. The "overbreath doctrine" applicable to statutes is equally applicable to Judgments and Injunctions. For the latest expression of the United States Supreme Court on the "overbreath doctrine," see *City of Houston v. Hill*, 482 U.S. 457, 96 L.Ed.2d 398, 107 S.Ct 2502 (1987).

#### 7. CONCLUSION

For the reasons stated above the writ of certiorari should issue to review the decision of the Court of Appeals of the Ninth Circuit.

Respectfully submitted,



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(713) 444 2840

Attorney for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing document were duly served on each of the following specified parties on the date hereafter mentioned by depositing the same in the United States mail, postage prepaid, certified mail return receipt requested, addressed as follows:

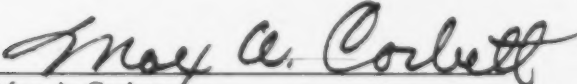
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San Francisco, California 94104

Attorneys for Amici Curiae

DATED: Houston, Texas, December 28, 1989.

  
Max A. Corbett

Attorney for Petitioners

FOR PUBLICATION

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

GENERAL CONFERENCE  
CORPORATION OF SEVENTH-DAY  
ADVENTISTS,

*Plaintiff-Appellee,*

v.

SEVENTH-DAY ADVENTIST  
CONGREGATIONAL CHURCH; JOHN R.  
MARIK,

*Defendants-Appellants.*

No. 88-2506

D.C. No.  
CV-87-0274 RES  
OPINION

Appeal from the United States District Court  
for the District of Hawaii  
Russell E. Smith, Senior District Judge, Presiding

Argued and Submitted  
May 11, 1989—San Francisco, California

Filed October 5, 1989

Before: Procter Hug, Jr., Mary M. Schroeder and  
William C. Canby, Jr., Circuit Judges.

Opinion by Judge Canby

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SUMMARY

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**Copyright, Patent and Trademark/Courts and Procedure**

Reversing and remanding the district court's judgment, the  
court held that a judgment on the pleadings is improper

where a defendant either raises questions of material fact or presents affirmative defenses.

Defendants Seventh-Day Adventist Congregational Church and John Marik appealed a judgment on the pleadings and the issuance of a permanent injunction against them in a trademark infringement action. Plaintiff General Conference Corporation of Seventh-Day Adventists brought a claim against defendants under the Lanham Act, 15 U.S.C. § 1051 et seq., for trademark and service mark infringement, unfair competition, and false designation of origin. Marik, pro se, and allegedly on behalf of the Congregational Church, filed a response and a denial of plaintiff's allegations. Because defendants filed no response to plaintiff's motion for judgment on the pleadings, the district court ordered that it be granted. Defendants' motion to set aside the judgment was denied, and defendants appealed.

[1] A judgment on the pleadings is a decision on the merits and it is reviewed de novo. [2] Defendants filed two pleadings which the district court construed as "answers." If these "answers" are construed liberally because Marik submitted them pro se, they set forth two points that either raise questions of material fact or present affirmative defenses. [3] Defendants claimed that the name Seventh Day Adventist is generic because it refers to a religion rather than the church organization. Defendants are not liable for trademark infringement if they prove that the mark is generic. Because this defense was raised in the answer, it bars a judgment on the pleadings. [4] Also in the answer, Marik made several factual assertions regarding the likelihood of confusion, and these factual allegations create a material issue of fact that should not have been determined in a judgment on the pleadings.

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#### COUNSEL

Max A. Corbett and Peter N. Fowler, Annandale, Virginia,  
for the defendants-appellants.

Lorraine H. Akiba, Honolulu, Hawaii, for the plaintiff-appellee.

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## OPINION

CANBY, Circuit Judge:

Defendants Seventh-Day Adventist Congregational Church and John Marik appeal a judgment on the pleadings and the issuance of a permanent injunction against them in a trademark infringement action. We reverse and remand for further proceedings.

### BACKGROUND AND PROCEEDINGS BELOW

The General Conference Corporation of Seventh-Day Adventists sued the Seventh-Day Adventist Congregational Church, located in Kealahou, Hawaii, and its pastor, John R. Marik, under the Lanham Act, 15 U.S.C. § 1051 et seq., for trademark and service mark infringement, unfair competition, and false designation of origin. The General Conference also asserted claims under the common and statutory law of Hawaii relating to trademarks, service marks, trade names, unfair competition, deceptive trade practices, and false advertising. The complaint was filed on April 9, 1987. Marik, pro se, and allegedly on behalf of the Congregational Church, filed a response on May 18, 1987. The General Conference thought the response, which was in letter form, did not comply with the rules, and notified the defendants that it would give them an extension, until June 15, 1987, to file an amended answer. No amended answer was filed by that deadline.

On July 15, 1987, the General Conference filed a motion for judgment on the pleadings, or in the alternative, a motion to strike the answer of Marik and the Congregational Church.

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A hearing on the motion was scheduled for September 8, 1987. On August 4, 1987, the defendants filed a "Denial of Plaintiff's Allegations." Pursuant to local rule, a scheduling conference was held August 10, 1987, before a magistrate. The magistrate advised Marik that the Congregational Church was an eleemosynary corporation and could not be represented pro se, and advised the Congregational Church to obtain legal counsel. The court continued the conference for that purpose.

The defendants filed no response to the motion for judgment on the pleadings. Because it received no opposition to the motion, the court ordered that judgment on the pleadings be granted, and denied the motion to strike. The judgment and a permanent injunction were entered December 8, 1987. The injunction prohibits the defendants from using a name that includes the term "Seventh Day Adventist" or "SDA," or promoting or representing to others that it is connected in any way with the General Conference. It also required the defendants to file a compliance report with the court within 30 days.

On December 28, 1987, the defendants, now represented by counsel, filed a motion for suspension of the injunction, a motion to set aside the judgment, and other related motions. On January 12, 1988, Marik and the Congregational Church filed a compliance report that stated that they refused to comply with the injunction because they believed the judgment was void for lack of subject matter jurisdiction, and because plaintiff's trademark was invalid. The General Conference responded with a motion to show cause why the defendants should not be held in contempt.

The district court denied defendants' motion to set aside the judgment, stating that the question whether "Seventh-Day Adventist" was a generic mark was one of law that had been decided in the judgment on the pleadings, and there was no reason to revisit the question upon a motion for new trial.

The defendants filed a notice of appeal on April 7, 1988. The district court then entered an order to show cause why defendants should not be held in contempt, and set a hearing for May 9, 1988. The district court held both Marik and the Congregational Church in contempt, set a fine of \$500 per day until compliance against both defendants, individually and collectively, and ordered that a warrant issue for Marik's arrest until full compliance with the injunction. The court also awarded plaintiff \$13,929.21 for attorneys' fees and costs incurred in pursuing the contempt order.

### DISCUSSION

[1] A judgment on the pleadings is a decision on the merits, and we review it *de novo*. See *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988). Judgment on the pleadings is proper when there are no issues of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 12(c). All allegations of fact by the party opposing the motion are accepted as true, and are construed in the light most favorable to that party. *McGlinchy*, 845 F.2d at 810. As a result, a plaintiff is not entitled to judgment on the pleadings when the answer raises issues of fact that, if proved, would defeat recovery. Similarly, if the defendant raises an affirmative defense in his answer it will usually bar judgment on the pleadings. See 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1368 (1969).

[2] The defendants filed two pleadings that the district court construed as "Answers." If we construe these "answers" liberally because Marik had submitted them *pro se*,<sup>1</sup> see *United States v. Ten Thousand Dollars (\$10,000) in U.S. Currency*, 860 F.2d 1511, 1513 (9th Cir. 1988), they set forth two

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<sup>1</sup>Marik purported to answer for his church, an eleemosynary corporation. Not being an attorney, he could not answer for the church. The district court did not strike the answer, however. The church was represented by counsel by the time of its motion for new trial.

points that either raise questions of material fact, or present affirmative defenses. In the same permissive mode, the second "answer" filed after the motion for judgment on the pleadings, may be construed as an opposition to the motion. For these reasons, judgment on the pleadings was improper.

A. *Is "Seventh Day Adventist" a Generic Term?*

A trademark, even if it has become incontestable, is subject to the defense that the mark is generic. *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194-95 (1985). A trademark's function is to identify and distinguish the goods or services of one seller from another. 1. J. McCarthy, *Trademarks and Unfair Competition* § 12:1 (2d ed. 1984). A generic mark is one that tells the buyer what the product is, rather than from where, or whom, it came. *Id.* A generic mark cannot be subject to trademark protection because it does not indicate the product or service's origin, but is the term for the product or service itself. *Id.*

[3] The defendants claim that the name "Seventh Day Adventist" is generic: it refers to a religion, rather than the church organization. *See Christian Science Bd. of Directors v. Evans*, 105 N.J. 297, 520 A.2d 1347 (1987). Marik discussed the generic nature of the church name in his "Answers." Construing the "Answers" liberally, we find that Marik sufficiently raised the issue as an affirmative defense when he stated:

The phrase "Seventh-day Adventist" is not theirs alone, as they would like to claim, for it describes a system or set of Bible based christian beliefs, doctrines [sic], and standards. One, therefore, is not necessarily a Seventh-day Adventist because of what organization he may be affiliated with, but rather, he is a Seventh-day Adventist because of what he believes. Seventh-day Adventism is a particular faith, and those that conscientiously hold to that



faith are Seventh-day Adventists. For an example, there are many different "Baptist" churches, but they all have a very similar faith.

Even assuming everything the General Conference alleges is true, the defendants are not liable for trademark infringement if they prove that the mark is generic. Because this defense was raised in the answer, it bars a judgment on the pleadings.

#### B. *Likelihood of Confusion*

To establish trademark infringement, the plaintiff must prove that there is a likelihood of confusion from the defendant's use of a mark similar to plaintiff's. *See* 15 U.S.C. § 1114; *Century 21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175, 1178 (9th Cir. 1988). Several factors are involved in determining likelihood of confusion, which is a question of fact. *See id.* at 1178-79; *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1355 (9th Cir. 1985) (*en banc*). These factors include: 1) the strength of the plaintiff's mark/name; 2) the proximity of the parties' goods; 3) similarity of the marks/names; 4) evidence of actual confusion; 5) marketing channels used; 6) likely degree of purchaser care; 7) defendant's intent in selecting the mark/name; and 8) likelihood of expansion of product lines. *Accuride Int'l, Inc. v. Accuride Corp.*, 871 F.2d 1531, 1533-34 (9th Cir. 1989).

[4] In the "Answers," Marik makes several factual assertions regarding the likelihood of confusion. First, he notes that the Congregational Church has "never in any way sought to deceive or confuse any one in regards to our name." He also states that the word "congregational" in the name of his church is explanatory, and distinguishes the two different churches. He states that "people have been quick to recognize this," and that the church intentionally used the word "congregational" to clarify that they were not affiliated with the plaintiff. All of these factual allegations go to the issue of likelihood of confusion, and create a question of material fact

that should not have been determined in a judgment on the pleadings.

*C. Other Matters*

Defendants attempt to challenge the order of the district court holding them in contempt. That order was entered, however, after the notice of appeal was filed. The order appealed from was not stayed. The notice of appeal stated that the appeal was from the judgment and injunction entered on December 8, 1987, and from the order denying new trial entered on March 16, 1988. It does not bring before us the later contempt order, and we decline to rule upon it. Further relief, if any, must come from the district court.

Because the contempt order is not before us, we deny the motion to supplement the record on appeal with the record of the contempt proceedings. We also deny, as not in compliance with Fed. R. Evid. 201, defendants' motion to take judicial notice of certain "adjudicative facts."

Remaining points urged by the defendants are without merit.

CONCLUSION

The judgment on the pleadings in favor of plaintiff is REVERSED, and the cause is REMANDED to the district court for further proceedings.

APPENDIX B

Opinion of the United States District Court for the District of Hawaii,  
in General Conference Corporation of Seventh-day Adventists v.  
Seventh-day Adventist Congregational Church and John R. Marik,  
C.A. 87-0274, entered on December 8, 1987.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

GENERAL CONFERENCE	) CIVIL NO. 87-274
CORPORATION OF SEVENTH-	)
DAY ADVENTISTS,	) JUDGMENT AND
Plaintiff,	) PERMANENT
	) INJUNCTION
v.	)
	)
SEVENTH-DAY ADVENTIST	)
CONGREGATIONAL CHURCH,	)
and	)
JOHN R. MARIK,	)
Defendants.	)
_____	)

JUDGMENT AND PERMANENT INJUNCTION

Pursuant to the Order Granting Motion for Judgment on the Pleadings, and Denying Motion to Strike entered herein on September 24, 1987 and based upon the pleadings and other papers filed herein, judgment as to all matters alleged in the Complaint is hereby entered in favor of Plaintiff GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS and against Defendants SEVENTH-DAY ADVENTISTS CONGREGATIONAL CHURCH and JOHN R. MARIK.

The Court hereby further orders, adjudges and decrees that

Defendants SEVENTH-DAY ADVENTISTS CONGREGATIONAL CHURCH and JOHN R. MARIK, and each of them, and all persons in active concert or participation with them (hereinafter collectively referred to as the "Defendants") are PERMANENTLY ENJOINED AND RESTRAINED:

(a) from using, promoting, advertising, imitating, copying or in any way displaying any name or mark that includes the term "SEVENTH-DAY ADVENTIST", or any term that is confusingly similar to "SEVENTH-DAY ADVENTIST", or is a simulation, reproduction, counterfeit, copy, colorable imitation, abbreviation (including, without limitation, the abbreviation "SDA" and any colorable imitations of "SDA"), or other designation thereof, in connection with the offering, promotion, advertising or rendering of services or the sale or distribution of any literature or other goods, or in connection with any other activity, in a manner likely to cause confusion or to cause mistake or to deceive;

(b) from using the term "SEVENTH-DAY ADVENTIST", or any term that is confusingly similar to "SEVENTH-DAY ADVENTIST", or is a simulation, reproduction, counterfeit, copy, colorable imitation, abbreviation (including, without limitation, the abbreviation "SDA" and any colorable imitations of "SDA"), or other designation thereof, in any trade name or corporate name of any entity controlled by the Defendants, or by any of them, and specifically from retaining the term "SEVENTH-DAY ADVENTIST" or "SDA" in the name of Defendants' church services, or in any offering, promotion, advertising or rendering of such services;

(c) from reproducing, counterfeiting, copying or colorably imitating the mark "SEVENTH-DAY ADVENTIST" and applying such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive;

(d) from using any false designation of origin or false description,

or representation, or performing any act, which can, or is likely to, lead the public or any individual members thereof, to believe that the Defendants' services are in any manner associated, affiliated or connected with Plaintiff's services, or Plaintiff sponsors, approves or authorizes the Defendants' services;

(e) from representing or in any way suggesting or implying that the church services of the Defendants are in manner associated, affiliated or connected with Plaintiff's church services, or that Plaintiff sponsors, approves or authorizes Defendants' church services;

(f) from representing or in any way suggesting or implying that any of the services, literature, products or goods of Defendants are in any manner associated or connected with Plaintiff's "SEVENTH-DAY ADVENTIST" services, literature, products or goods, or that Plaintiff sponsors, approves or authorizes Defendants' services, literature, products or goods;

(g) from making any other false or misleading representation with respect to the authenticity or standard or nature of either Plaintiff's or Defendants' services or goods;

(h) from applying for or registering any service mark, trademark, trade name, certification mark or collective mark that is a reproduction, simulation, counterfeit, copy, colorable imitation, abbreviation (including, without limitation, the abbreviation "SDA" and any colorable imitations of "SDA"), or other designation of Plaintiff's "SEVENTH-DAY ADVENTIST" mark with any governmental entity;

(i) from engaging in any other activity constituting an infringement of Plaintiff's service mark, trademark and tradename "SEVENTH-DAY ADVENTIST", or of Plaintiff's rights in and to such service mark, trademark and trade name;

(j) from engaging in any other activity constituting unfair competition with Plaintiff or constituting unfair or deceptive trade practices;

(k) from creating any confusion as to source, sponsorship or approval as to the Plaintiff's or the Defendants' services and goods; and

(l) from taking any actions that may injure Plaintiff's goodwill and reputation by way of imitation, misrepresentation, advertising, fraud, passing off or deception.

DEFENDANTS ARE HEREBY ORDERED:

(a) to deliver up to Plaintiff for destruction all labels, signs, prints, advertising materials, literature, packages, wrappers and other materials in the possession or custody of the Defendants, or any of them, or under their control, bearing the term "SEVENTH-DAY ADVENTIST", or any term that is confusingly similar to "SEVENTH-DAY ADVENTIST", or is a simulation, reproduction, counterfeit, copy, colorable imitation, abbreviation (including, without limitation, the abbreviation "SDA" and colorable imitations of "SDA"), or other designation thereof, and all plates, molds, matrices and other means of making the same; and

(b) to file with this Court and to serve on the Plaintiff within thirty (30) days after service of this Judgment and Permanent Injunction, a written report under oath setting forth in detail the manner and form in which the Defendants have complied with this injunction.

DATED: Honolulu, Hawaii, November 30, 1987.

/s/ Roger D. Foley

Judge of the Above-Entitled Court

## APPENDIX C

### Statutes Involved in Case

#### 15 U.S.C. Sec. 1051

Registration; application; payment of fees; designation of resident for service of process and notice

The owner of a trademark used in commerce may register his trademark under this chapter on the principal register established:

(a) By filing in the Patent and Trademark office - . . . .

#### 15 U.S.C. Sec. 1055

Use by related companies affecting validity and registration

Where a registered mark or a mark sought to be registered is or may be used legitimately by related companies, such use shall inure to the benefit of the registrant or applicant for registration, and such use shall not affect the validity of such mark or of its registration, provided such mark is not used in such manner as to deceive the public. If first use of a mark by a person is controlled by the registrant or applicant for registration of the mark with respect to the nature and quality of the goods or services, such first use shall inure to the benefit of the registrant or applicant, as the case may be.

#### 15 U.S.C. Sec. 1065

Incontestability of right to use mark under certain conditions

Except on a ground for which application to cancel may be filed at any time under subsections (3) and (5) of section 1064 of this title, and except to the extent, if any, to which the use of a mark registered on the principal register infringes a valid right acquired under the law of any State or Territory by use of a mark or trade name continuing from a date prior to the date of registration under this chapter of such registered mark, the right of the registrant to use such registered mark in commerce for the goods or services on or in connection with which such registered mark has been in continuous use for five consecutive years subsequent to the date of such registration and is still in use in commerce, shall be incontestable: Provided, That- . . . .

(4) no incontestable right shall be acquired in a mark which is the generic name of the goods or services or a portion thereof, for which it is registered. . . .

#### 15 U.S.C. Sec. 1115

Registration on principal register as evidence of exclusive right to use mark; defenses . . .

(b) If the right to use the registered mark has become incontestable under section 1065 of this title, the registration shall be conclusive evidence of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the affidavit filed under the provisions of said section 1065 subject to any conditions or limitations stated therein except when one of the following defenses or defects is established:

(1) That the registration or the incontestable right to use the mark was obtained fraudulently; or . . .

(3) That the registered mark is being used, by or with the permission of the registrant or a person in privity with the registrant, so as to misrepresent the source of the goods or services in connection with which the mark is used; or . . .

(7) That the mark has been or is being used to violate the antitrust laws of the United States.

#### 15 U.S.C. Sec. 1120

##### Civil liability for false or fraudulent registration

Any person who shall procure registration in the Patent and Trademark Office of a mark by a false or fraudulent declaration or representation, oral or in writing, or by any false means, shall be liable in a civil action by any person injured thereby for any damages sustained in consequence thereof.

#### 15 U.S.C. Sec. 1121.

##### Jurisdiction of Federal Courts

The district and territorial courts of the United States shall have original jurisdiction and the courts of appeal of the United States (other than the United States Court of Appeals for the Federal Circuit) shall have appellate jurisdiction, of all actions arising under this chapter, without regard to the amount in controversy or to diversity or lack of diversity of the citizenship of the parties.



15 U.S.C. Sec. 1127

Construction and definitions; intent of chapter

In the construction of this chapter, unless the contrary is plainly apparent from the context- . . .

The term "applicant" and "registrant" embrace the legal representatives, predecessors, successors and assigns of such applicant or registrant. . . .

The term "related company" means any person who legitimately controls or is controlled by the registrant or applicant in respect to the nature and quality of the goods or services in connection with which the mark is used. . . .

The term "trademark" includes any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify and distinguish his goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown. The term "service mark" means a mark used in the sale or advertising of services to identify and distinguish the services of one person, including a unique service, from the services of others and to indicate the source of the services, even if that source is unknown. Titles, character names and other distinctive features of radio or television programs may be registered as service marks notwithstanding that they, or the programs, may advertise the goods of the sponsor. . . .

The term "registered mark" means a mark registered in the United States Patent Office under this chapter or under the Act of March 3, 1881, or the Act of February 20, 1905, or the Act of March 19, 1920. The phrase "marks registered in the Patent and Trademark Office" means registered marks. . . .

The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trade-marks, trade names, and unfair competition entered into between the United States and foreign nations.

28 U.S.C. Sec. 1254

Court of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

28 U.S.C. Sec. 1291

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. Sec. 1331

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Sec. 1338

Patents, plant variety protection, copyrights, trademarks, and unfair competition

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trade-mark laws.

Hawaii Rev. Statutes, Title 26

Sec. 480-2 Unfair competition, practices, declared unlawful.

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.

Sec. 481-3 Sales at less than cost

No person, partnership, firm, corporation, joint stock company, or other association engaged in business within the State shall sell, offer for sale, or advertise for sale any article, or product or service or output of a service trade, at less than the cost thereof to such vendor, or give, offer to give, or advertise with the intent to give away any article or product, or service or output of a service trade, with the intent to destroy competition. . . .

Sec. 482-4 Certain prints, labels, trademarks, service mark, union labels and tradenames not to be adopted or used.

(a) It shall be unlawful for any person to adopt or use a print, label, trademark, service mark, or trade name which is identical to or confusingly similar with any registered print, label, trademark, service mark, or trade name, or the name of any partnership or corporation registered in accordance with the laws on partnerships or domestic or foreign corporations.

## APPENDIX D

### FEDERAL REGULATIONS AND RULES

#### 37 Code of Federal Regulations

##### Sec. 2.33 Requirements of Application

(a)(i) The application shall include a request for registration and shall specify: . . .

(vii) The date of applicant's first use of the mark as a trademark on or in connection with goods specified in the application, specifying the nature of such commerce (see Sec. 2.38); (viii) The date of applicant's first use in commerce of the mark as a trademark on or in connection with goods specified in the application, specifying the nature of such commerce (see Sec. 2.38); . . .

(b) The application must also include averments to the effect that the applicant or other person making the verification or declaration in accordance with Sec. 2.20 believes himself or the firm, corporation, or association in whose behalf he makes the verification or declaration in accordance with Sec. 2.20 to be the owner of the mark sought to be registered; that the mark is in use in commerce, specifying the nature of such commerce; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use such mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when applied to the goods of such other person, to cause confusion, or to cause mistake, or to deceive; that the specimens or facsimiles show the mark as actually used in connection with the goods; and that the facts set forth in the application are true. . . .

##### Sec. 2.38 Use by predecessor or by related companies.

(a) If the first use, the date of which is required by paragraphs (a)(i)(vii) or (viii) of Sec. 2.33, was by a predecessor in title, or by a related company (sections 5 and 45 of the Act), and such use inures to the benefit of the applicant, the date of such first use may be asserted with a statement that such first use was by the predecessor in title or by the related company as the case may be.

(b) If the mark is not in fact being used by the applicant but is

being used by one or more related companies whose use inures to the benefit of the applicant under section 5 of the Act, such facts must be indicated in the application.

(c) The Office may require such details concerning the nature of the relationship and such proofs as may be necessary and appropriate for the purpose of showing that the use by related companies inures to the benefit of the applicant and does not affect the validity of the mark.

## TRADEMARK MANUAL OF EXAMING PROCEDURE

### Sec. 1201.02(b) Related Company, Form of Application

In a related company situation, the party who controls the nature and quality of the goods or services with which the mark is used and who is thereby the owner of the mark, should be set out in the application as applicant. The body of the application should state that applicant has adopted and is using the mark. Since applicant's adoption and use of the mark is through a related party, however, it should also be stated at this point in the application that applicant is using the mark through its related company (or equivalent explanatory wording). Use which inures to applicant's benefit is a proper and sufficient support for an application and satisfies the requirement of 37 CFR Sec. 233(a)(1)(iv) to the effect that applicant has adopted and is using the mark.

If it is not otherwise clear in the record, the Examining Attorney must specifically determine how applicant controls the nature and quality of the goods or services and how use by the related company inures to applicant's benefit.

## APPENDIX E

### TREATISES

#### American Jurisprudence

##### 29 Am. Jur 2d Evidence

Sec. 15 Judicial, as distinguished from actual knowledge.

Judicial notice in any particular case is not determined or limited by the actual knowledge of the individual judge or court. This means that it is not essential that matters of judicial cognizance be actually known to the judge; if they are proper subjects of judicial notice, the judge may inform himself in any way which may seem best to his discretion, and act accordingly. On the other hand, facts which are not judicially cognizable must be proved, even though known to the judge or to the court as an individual. In other words, the individual and extrajudicial knowledge on the part of a judge will not dispense with proof of facts not judicially cognizable, and cannot be resorted to for the purpose of supplementing the record.

Sec. 16. Use of encyclopedias, textbooks, etc.

Since judicial notice is not limited by the actual knowledge of the individual judge, judges may refresh their memories upon matters properly subject to judicial notice from encyclopedias, textbooks, dictionaries, or other publications of established authenticity. However, the mere appearance of facts within such publications does not, in most jurisdictions, entitle them to judicial notice unless they are such as to be a part of common knowledge. But it is otherwise in jurisdictions which adhere to the rule that judicial notice may be taken of facts not of general common knowledge, provided they can be verified to a certainty by reference to competent authoritative sources.

Sec. 25 Matters of verifiable certainty.

It has been suggested by one authority that the trend of judicial notice is shifting from the test of common knowledge to that of

verifiable certainty. At least one jurisdiction has subscribed to the rule that a trial court in its discretion may take judicial notice of facts of verifiable certainty either upon its own motion or upon the request of a party to the action. If the fact to be noticed is not one of general common knowledge, but can be verified to a certainty by reference to competent authoritative sources, and is to be used as an adjudicative, as distinguished from a legislative fact, the trial judge or the party requesting judicial notice should notify the parties or the adversary, as the case may be, so as to afford them an opportunity of consult the same sources or of producing others. This does not mean there will be a trial of textbooks, but rather it serves only to apprise the court whether the subject is verifiable certain, or whether the issue must be proved and determined as a fact question.

#### Sec. History, generally.

The general rule is that matters of history, if sufficiently notorious to be subject to general knowledge, will be judicially noticed. The basis for the rule is that the facts of history enter into the construction of the laws, and so must be in the knowledge of the court the duty of which it is to construe them. Matters of public history concerning the United States or the particular state where the court has jurisdiction and affecting the whole people will always be judicially noticed. Similarly, judicial notice will be taken of the past history of territory acquired by the United States, as well as the history of acquisition. . . .

#### Sec. 77. Religious matters.

Matters of religious history are deemed of common knowledge and therefore of judicial notice, whether general or of a particular sect or denomination. The courts have taken judicial notice of the numerous sects into which the religious world is divided, the prevalence of a certain sect in a given locale, the general doctrines and rules of each sect, or at least of each sect within their jurisdiction, the distinction in belief between any sects or group of sects, and of the separation of two sects formerly one. The courts have taken judicial notice of the expulsion usages of particular sects, of the fact that attendance at any particular church is not limited to its members, and of the fact that many incorporated church societies have been in existence. However, judicial notice of the nature and powers of the Roman Catholic Church so far as its civil rights and duties are

concerned will not be taken without averment or proof upon the subject.

The courts have also taken judicial notice of the contents of the Bible, the form or manner of worship, and God's natural laws as demonstrated by science or admitted by man's natural experience.

American Law Reports

33 ALR3d 448 Appealability of Contempt Adjudication or Conviction

Sec. 23. Review of contempt judgment on appeal from final judgment in main cause

A number of cases support the view — either by holding or dicta — that judgments of civil contempt, though interlocutory and therefore not directly appealable, are reviewable on the appeal taken from the final judgment in the suit out of which the contempt proceedings arose. . . .

McCormick on Evidence, 3rd ed, Lawyer's ed

Chapter 26, Admissions

Sec. 269 Admissions by Conduct: (a) Adoptive Admissions

One may expressly adopt another's statement as his own. That is an explicit admission like any other, is to be classed as an express admission, and calls for no further discussion. In this text the term adoptive admission is applied to evidence of other conduct of a party which manifests circumstantially the the party's assent to the truth of a statement made by another person. . . .

Chapter 35, Judicial Notice

Sec. 330 Facts Capable of Certain Verification

The earlier and probably still the most familiar basis for judicial notice is "common knowledge," but a second and distinct principle has come to be recognized as an even more significant ground for the invocation of the doctrine. This extension of judicial notice was first disguised by a polite fiction so that when asked to notice a fact not generally known, but which obviously could easily be ascertained by consulting materials in common use, such as the day of the week on which January 1 fell ten years ago, the judges resorted to calendars but purported to be "refreshing memory" as to a matter of common knowledge. Eventually it was recognized that involved here was an



important extension of judicial notice to the new field of facts "capable of accurate and ready demonstration," "capable of such instant and unquestionable demonstration, if desired, that no party would think of imposing a falsity on the tribunal in the face of an intelligent adversary," or "capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy." It is under this caption, for example, that courts have taken judicial notice of the scientific principles which, while verifiable but not likely commonly known, justify the evidentiary use of radar, blood tests for intoxication and nonpaternity, handwriting and typewriter identification, and ballistics. . . .

**Moore's Federal Practice**

Vol. 10, Sec. 201.40 (d) When Mandatory

Taking judicial notice of "adjudicative facts" not subject to reasonable dispute is mandatory under subsection (d) when the court is requested to do so and is "supplied with the necessary information."

In making judicial notice discretionary in all other circumstances, the Advisory Committee assumed it was codifying "existing practice," and endorsing a scheme which was "simple and workable."

Naturally, the leeway available in determining whether the "necessary information" has been supplied, affords a court considerable latitude in deciding whether or not to take judicial notice.

## APPENDIX F

### ENCYCLOPEDIAS AND DICTIONARIES

A New English Dictionary on Historical Principles, Henry Bradley, 1914 ed.

#### Seventh-day

2. the seventh day of the week, Saturday; the (Jewish) Sabbath; transf. Sunday. . . .

b. In the designations of bodies of Christians who observe the seventh day of the week (Saturday) as the principal day of rest and religious observance. Seventh-day Adventists: a millenarian sect holding sabbatarian principles. . . .

New Werner Twentieth Century Edition of Encyclopedia Britannica, Vol. 25, 1905 ed., p. 52.

ADVENTISTS. The general name of Adventists is applied to a group of six more or less cognate sects of the Christian church, originating and existing chiefly in ~~the~~<sup>the</sup> United States and Canada. Their founder was William Miller - from whom they have been called Millerites - who about 1831 began to preach the nearness of the second coming of Christ, and who assumed several times to fix the exact time date of the Advent, basing his calculations upon the prophecies of Daniel, the Revelation, and other books of the Bible. The first date set by him was in 1843, and when it passed without the Advent he changed it to a day in October, 1844, when he and thousands of his followers put on their "ascension robes" and awaited the end of the world. Since that time no date has been fixed, but the Adventists have continued in a state of expectancy, looking for the visible personal second coming of Christ, the resurrection of the dead, and the establishment of the millennium. There are now six major divisions of the Adventist church, as follows: I. - Evangelical Adventists. These were the original Adventists, who adopted their present name in 1845. Their creed includes belief in the resurrection

of all, eternal happiness for the saved, and eternal punishment for the lost. 2. - Seventh Day Adventists. These formed a separate body in 1845. They observe the seventh day, Saturday, as the Sabbath, and believe in the present day gift of prophecy and the annihilation of the unsaved. 3. - Church of God, or Age- to-Come Adventists. This body of Adventists was formed about 1850, upon a belief in the visible establishment of Christ's kingdom upon the earth, the restoration of Israel, and the annihilation of the wicked. 4. - Advent Christians. These became a distinctive body in 1861. They believe that immortality is conditioned upon faith in Christ. 5. - The Church of God. This body was formed in 1865 by a secession from the Seventh-day Adventists of those who disbelieved in present day prophecy. In other respects its creed is similar to that of the Seventh Day Adventists. 6. - The Life and Advent Union. This organization was formed in 1860, and believes that only the righteous are to resurrected, those who have died in their sins being forever dead.

Seventh-day Adventist Encyclopedia, 1966 ed., p. 1179, 435

SEVENTH-DAY ADVENTIST. The descriptive name adopted as a denominational title in 1860 by one branch of Adventists - those, specifically, who keep the seventh day as the Sabbath. (For the circumstances of the adoption of the denominational name, see Organization, I.) The people who first took the name in 1860 were already Adventists, not only in the broad sense of believing in the nearness of the Second Advent - for many in various parts of the world in the 1840s and earlier had believed that - but also in the restricted sense of having developed from the Millerite movement, which had called itself Adventist. By adopting the name, the Sabbathkeeping Adventists distinguished themselves from the other denominations of the Millerite movement.

Thus the popular explanation that the name was selected as denoting one who believes in the Second Advent and observes the seventh day is an oversimplification. First, there are non-Adventists who observe the seventh day - the Seventh Day Baptists. Second, the term "Adventist" does not include all who believe in the Second Advent (for example, the Apostles' Creed professes belief in the Second Advent) any more than the term Presbyterian belongs to all whose churches are governed by elders (presbyters) or the term Baptist to all who limit baptism to the immersion of believers (both

of which would apply to SDA's).

The full title "Seventh-day Adventist" (or the equivalent title in various languages) is the official name of a specific Christian denomination with a specific body of doctrines, of which the Sabbath and the Second Advent form only a part. . . .

#### GENERAL CONFERENCE CONSTITUTION AND BYLAWS.

The basic documents of the organization called the General Conference of SDA's. The General Conference is an unincorporated body brought into existence to administer the general affairs of the church, and especially to pursue its evangelistic aim, "to teach all nations the everlasting gospel of our Lord and Saviour Jesus Christ and the commandments of God" (Constitution, Article II).

The adoption of the first constitution in Battle Creek, Michigan, on May 21, 1863, climaxed a decade or more of lively discussions among the members regarding the advisability of church organization. Those who opposed organization, or "order," argued that it would trespass upon the believers' individual Christian liberty, and some even said that such a church organization would immediately become Babylon. Those who set forth the benefits of organization pointed out that it would prevent confusion, control fanaticism, and make provision for accrediting of the ministry, the holding of property, and the support of the work. Ellen G. White as early as 1853 urged the establishing of the church upon "gospel order." The General Conference was organized by delegates from six State conferences - Michigan, Wisconsin, Iowa, Minnesota, New York, and Ohio - meeting at Battle Creek in 1863. . . .

The Encyclopedia Americana, Vol. 24, 1972 ed., p. 620

SEVENTH-DAY ADVENTISTS, a Christian evangelistic movement that developed in the 19th Century as an outgrowth of the general advent awakening. It is rooted in the Millerite movement of the 1840's and is in part distinguished by the observance of the seventh day (Saturday) sabbath as a memorial of God's creation and by faith in the imminent, personal return of Jesus.

The essence of Seventh-day Adventists is salvation by faith in God the Son, Jesus Christ, whose life and death provide for the restoration of man to his original relationship with God. For

Adventists the Bible authentically records God's self-revelation in his saving acts by Jesus Christ, whose life and death provide for the restoration of man to his original relationship with God. For Adventists the Bible authentically records God's self-revelation in his saving acts by Jesus Christ, whose life demonstrated God's perfect will for man as enunciated in the moral law. Adventists expect the culmination of man's redemption in the return of Jesus Christ to begin his kingdom of glory. Events at the end of the present age will see the bestowal of immortality upon the redeemed, both living and resurrected, whose destiny has been determined by one phase of God's judgment. The destruction of sin and sinners follows the final phase of judgment and prepares for the creation of new heavens and a new earth, which completes the work of restoring man to God.

As authoritative voice in the Seventh-day Adventist movement from its beginning has been that of Ellen G. White, who claimed special revelations from God. She pioneered with such leaders as Hiram Edson, Joseph Bates, and her husband James White. Her counsels led to the formal organization of the Seventh-day Adventist Church in Battle Creek, Mich., in 1863, and continue to give direction in the development of the church. She wrote some 45 books and thousands of articles in such fields as education, health, and Christ-directed living.

Teaching redemption of the whole man, Adventists proscribe the use of "unclean" foods, alcoholic beverages, and tobacco, and the nonmedical use of drugs. They advocate a vegetarian diet and a balanced program of exercise and hygienic living. They carry on work in 185 countries and territories, operating over 325 medical units and supporting 450 colleges and secondary schools and nearly 4,000 elementary schools.

Adventist churches are organized along congregational lines within state conferences, union conferences, and world divisions of a general conference, with headquarters in Washington, D.C. Adventist membership exceeds 2 million.

ROBERT H. PIERSON, President

General Conference of Seventh-day Adventist

The Encyclopedia of American Religions, 2nd ed., 1987, J. Gordon Melton,

## Chapter Eleven

### THE ADVENTIST FAMILY, p. 77

Since the beginning of Christianity, various groups have arisen sporadically to preach a type of faith that has been called apocalyptic, chiliastic, or millennial. The movements have been characterized by the expectation of the immediate return of Christ to bring a final end to "this evil order" and replace it with a new world of supreme happiness and goodness. At every turning point in the history of Christianity, people supporting such movements appeared, sometimes within the mainstream of church activities as disturbers of accepted patterns of life, and sometimes at the outer edge of church activities as critics and reformers. Always their presence is felt because they promote an idea which orthodox Christians have said to be part of the faith. . . .

MILLENNIALISM IN AMERICA. (p. 79-81). The American millennial movement which today is known as Adventism had its beginning in New York, started there by William Miller, a Baptist layman. Miller had settled in New York after the War of 1812. For awhile Miller was a Deist, denying that God interferes with the laws of the universe, and stressing morality and reason rather than religious belief. Then Miller began to study the Bible. This study, which lasted about two years, seemed to satisfy his major doubts, but also convinced him that he was living near the end of his age. Further study over several years convinced him not only that the end was near, but also that he had to go and tell the world about it. His first labors were at Dresden, New York, where a revival followed his speaking in 1831. . . .

Miller's movement was taking on a more definite shape in this period. Before the end in 1843, the first camp meeting was held at East Kingston, New Hampshire. In November, the second periodical, *The Midnight Cry*, was begun. Miller was also sharpening his views. Until 1843, Miller had been vague about the second coming as being "about the year 1843." But on January 1st, he committed himself to a more definite stance: "I am fully convinced that somewhere between March 21st, 1843 and March 21st, 1844, according to the Jewish mode of computation of time, Christ will

come." . . . March 14, 1843, came and went. . . . In August, Samuel S. Snow put forth the "seventh month" scheme which looked to October 22, 1844, as the real date of return. Tension reached a new high. On October 22, the Adventists gathered to await the Lord. However, as one author put, "But the day came. And Christ did not." . . . Ethical positions among Adventists have shown two seemingly divergent trends. An emphasis on the Old Testament and on the law as mandatory for Christians has developed out of the acceptance of the Sabbath. Some groups have gone so far as to celebrate Jewish holidays and dietary laws. The celebration of the Sabbath has been promoted by the ecumenical Bible Sabbath Association, which was formed as a counterpart of the Lord's Day Alliance of the United States. . . .

Adventist Family (p. 431-435)

Sunday Adventists (p. 431) . . .

Seventh-Day Adventists (p. 432)

BRANCH SDA'S

Box 4666

Waco, TX 76705 . . . .

DAVIDIAN SEVENTH-DAY ADVENTISTS  
ASSOCIATION (p. 432)

Pashan Hill

Exeter, MO 65647 . . .

GENERAL ASSOCIATION OF DAVIDIAN  
SEVENTH-DAY ADVENTIST (p. 433)

Rte. 1, Box 174

Salem, SC 29676 . . .

SEVENTH-DAY ADVENTIST CHURCH,  
REFORM MOVEMENT (p. 434)

American Union

6380 63rd St.

Sacramento, CA 95824 . . . .

SEVENTH-DAY ADVENTIST CHURCH  
6840 Eastern Ave., N.W. (p. 435)

Washington, D.C. 20012

The Westminster Dictionary of Church History, Jerald C. Brauer, 1971 ed., p. 763, 764.

Seventh-day Adventists

A religious denomination that grew out of the ministry of William Miller. This group is a conservative legalistic, premillennial body which emphasizes the observance of Saturday as the Sabbath and acknowledges the inspiration of Ellen G. White. William Miller and Mrs. White were 19th-century Americans who believed that Christ would return in 1844. The Adventists began by rationalizing the Biblical passages which they felt had been fulfilled then. However, they were not formally organized until 1863. They now believe that the only prophetic texts waiting to be fulfilled concern their church and its ministry. When the Adventist message has been proclaimed throughout the world and their church has been built to its predestined size, then the end of the age will come. Besides their prophetic interests, the Adventists believe in soul sleep until the resurrection of the dead, when the faithful will be rewarded while the wicked will be destroyed. Adventists practice baptism by total immersion and have a congregational church polity tempered by local and national conferences. The group has a heavy commitment to missions, printing, and education. There are approximately 3,326 Seventh-day Adventist Churches with 370,688 members in the United States, and the worldwide membership is believed to be approximately twice this figure.

Universal Dictionary of the English Language, Robert Hunter and Charles Morris, 1897 ed.

**Adventist** A believer in the second advent or coming of Christ. Adventists are divided into Advent (or Second Advent) Christians, Seventh-day Adventists (of whom there are 34,000 in these States) and Evangelical Adventists.

Webster's New International Dictionary, Third Ed., 1958, p. 38

**Adventism** a. A believer in the doctrine that the second coming of Christ and the end of the world (or age) are near at hand. b. Specif., this doctrine as preached by William Miller from 1831 on, and by his followers.

**Adventist** A believer in the doctrine of Adventism; a member of



a religious body emphasizing this doctrine; - called also Second Adventist.

#### TABLE OF ADVENTIST BODIES IN THE UNITED STATES

Name	History	Doctrines, Etc.
Evangelical Adventists	...	...
Advent Christian Church	...	...
Seventh-day Adventist Denomination	*	**
Church of God (Adventist)	...	...
Life and Advent Union	...	...
Churches of God in Christ Jesus	...	...

\* Some followers of Wm. Miller began in 1844 and 1845 to observe the seventh day; organized with present name at Battle Creek, Mich, in 1860.

\*\* Observance of the seventh day; immortality received only through faith in Christ; after the Second Advent and millennium, annihilation of Satan and the wicked.

The American Heritage Dictionary, William Morris, 1981 ed.

Seventh-Day Adventist. A member of a sect of Adventism distinguished chiefly for its observance of the Sabbath on Saturday.

The World Book Encyclopedia, Vol. 17, 1989 ed., p. 326

Seventh-day Adventists, are a Christian religious denomination. Members of this denomination believe that Christ will return in person. They also observe the Sabbath on Saturday, the seventh day of the week.

Adventists originated in the early 1800's, when many people in America and Europe became absorbed in the doctrine of Christ's second coming. References in the Bible that seemed to prophesy the time of Christ's coming aroused their interest. Followers of William Miller, a Baptist minister, predicted a definite time for the coming, but Miller's interpretation proved wrong. One group restudied Bible

prophecies. It decided that what had happened was the beginning of the judgment in heaven that is to precede the second coming of Christ. This group organized in 1863 as the Seventh-day Adventists.

The denomination has about 4 1/2 million members throughout the world, including more than 675,000 in the United States and Canada. The headquarters of the denomination are located at 6840 Eastern Ave. N.W., Washington, DC 20012.

## APPENDIX G

### HISTORIES AND BIBLE

A History of Churches in the United States and Canada, Robert T. Handy, 1977 ed.

p. 194-196

Another development in the 1830s and 1840s added to the difficulties of the evangelicals. Though the millennium was often referred to in sermons and writings, Protestant leaders did not normally undertake to set the date of its coming. But that was done by William Miller (1782-1849), former Deist who had been received as a convert in the Baptist church at Low Hampton, New York, in 1816. Troubled by the charge that the Bible was inconsistent, he found the solution of the difficulties in the millennial prophecies, especially of the books of Daniel and Revelation. When he announced his conclusion that Christ would return to earth in 1843, he soon became famous and engaged in considerable travel, illustrating his predictions with a huge chart. Many thousands from various denominations flocked to his meetings.

Several specific dates for the return of the Lord were set and passed - finally all was staked on 22 October 1844. Disillusionment followed - some returned to their churches, others lost interest in religion, while a few remained faithful to the Adventist or millenarian cause, believing that somehow a chronological error had been made. An Adventist general conference was held in Albany in 1845, but the movement, torn by controversy, proliferated into a number of bodies, such as the Advent Christian Church and the Church of God (Adventist). One stream of the movement adopted the Seventh-day (Saturday) observance of the Sabbath and eventually became the Seventh-day Adventist Church. A biblicistic, revivalist spirit marked these continuing Adventist bodies as a new denominational family was added to the widening spectrum of American religion. . . . The percentage of church members in proportion to the population had been steadily increasing throughout the period, as denominations

in which revivalism was strong surpassed the others in size.

p. 294

Agreeing on many points with the larger evangelical denominations but self-consciously separated from them by certain distinctive emphases were a number of smaller bodies, most of them very conservative theologically. The Adventist churches that had stemmed from the Millerite excitement and disappointment of the 1840s continued to multiply in the post-Civil War period. The Seventh-day Adventists had a remarkable leader in the prophetess Ellen Harmon White (1827-1915), whose spiritual visions and concerns about matters of diet and health set their mark on a steadily growing church. In the twentieth century, Seventh-day Adventist mission, stewardship, and publication efforts were impressive for so relatively small a denomination.

p. 374

In the years following Confederation, a number of the new religious movements of Great Britain and the United States found their way into Canada. Among them were those with varying Adventist and millenarian views, such as Seventh-day Adventists, Jehovah's Witnesses, and Plymouth Brethren.

### Bible

Exodus 20:8-11 NKJ

Remember the Sabbath day, to keep it holy. Six days you shall labor and do all your work, but the seventh day is the Sabbath of the Lord your God. In it you shall do no work: you, nor your son, nor your daughter, nor your manservant, nor your maidservant, nor your cattle, nor your stranger who is within your gates. For in six days the Lord made the heavens and the earth, the sea, and all that is in them, and rested the seventh day. Therefore the Lord blessed the Sabbath day and hallowed it.

James 2:10 NIV

For whosoever keeps the whole law and yet stumbles at just one point is guilty of breaking all of it.

John 14:3 NKJ

"And if I go and prepare a place for you, I will come again and receive you to Myself; that where I am, there you may be also.

Revelation 14:9-12 NKJ

Then a third angel followed them, saying with a loud voice, "If anyone worships the beast and his image, and receives his mark on his forehead or on his hand, he himself shall also drink of the wine of the wrath of God, which is poured out full strength into the cup of His indignation. And he shall be tormented with fire and brimstone in the presence of the holy angels and in the presence of the Lamb. And the smoke of their torment ascends forever and ever, and they have no rest day or night, who worship the beast and his image, and whoever receives the mark of his name." Here is the patience of the saints; here are those who keep the commandments of God and the faith of Jesus.

Revelation 16:1,2 NKJ

Then I heard a loud voice from the temple saying to the seven angels, "Go and pour out the bowls of wrath of God on the earth." So the first went and poured out his bowl upon the earth, and a foul and loathsome sore came upon the men who had the mark of the beast and those who worshiped his image.

## APPENDIX H

### DENOMINATIONAL BOOKS

Early Writings, E.G. White, Prologue, p. xx

As we trace the story of the beginning of Sabbath-keeping among the early Adventists, we go to a little church in the township of Washington in the heart of New Hampshire, the State that adjoins Maine on the east and whose western boundary is within sixty miles of the New York State line. Here the members of an independent Christian church in 1843 heard and accepted the preaching of the Advent message. It was an earnest group. Into their midst came a Seventh Day Baptist, Rachel Oakes, who distributed tracts setting forth the binding claims of the fourth commandment. Some in 1844 saw and accepted this Bible truth. One their number, William Farnsworth, in a Sunday morning service, stood to his feet and declared that he intended to keep God's Sabbath of the fourth commandment. A dozen others joined him, taking their stand firmly on all of God's commandments. They were the first Seventh-day Adventists.

Seventh-day Adventist Church Manual, 1986, p. 37,38

#### FORMS OF CHURCH GOVERNMENT

There are four generally recognized forms of church government. These may be summarized as follows:

1. Episcopal - . . . .
2. Papal - . . . .
3. Independent - the form of church polity that makes the local church congregation supreme and final within its own domain. This is usually referred to as congregationalism.
4. Representative - the form of church government which recognizes that authority in the church rests in the church membership, with executive responsibility delegated to representative bodies and officers for the governing of the church. This form of church government recognizes also the equality of the ordination of the

entire ministry. The representative form of church government is that which prevails in the Seventh-day Adventist Church.

Seventh-day Adventist Yearbook 1988

p. 241

HAWAII CONFERENCE

Established 1895; organized 1918 Territory: Hawaii and Johnston Island Population: 1,062,300; churches, 21; members 4,451.

p. 495

HEALTH-CARE INSTITUTIONS - HOSPITALS AND SANITARIUMS

CASTLE MEDICAL CENTER

640 Ulukahiki Street

Kailua, Hawaii 96734

Established 1961; opened 1963

Seventh-day Adventism Renounced, D.M. Canright, 1889 ed.

p. 25

Seventh-day Adventism originated about fifty years ago in the work of Mr. Miller, who set the time for the end of the world in 1843-4. Adding some doctrines to the original faith, Elder James White and wife in 1846 became the leaders of the Seventh-Day branch of Adventism. Their headquarters were at different times at Paris, Me., Saratoga, Oswego, and Rochester, N.Y. In 1855 they settled permanently at Battle Creek, Mich., which has remained the center of the work ever since.

p. 20,21

Seventh-Day Adventist believe and teach that before the second coming of Christ the United States will form a union of church and state, and, like France and Spain in the seventeenth century, will become a persecuting power. They hold that the prophetic Scriptures clearly foretell this extraordinary change in the form and spirit of our government. Touching the correctness of the interpretations of Scripture upon which their expectations are based, they admit no

possibility of mistake. They assume to know that they have the right key to prophecy - that they have the "present truth." They believe and teach that the Seventh-Day Adventists are to be especially tried in this ordeal that is being prepared by the civil government; that they are to be the chief victims of the fiery persecutions that will be waged against the "Saints of the Most High;" that they are to suffer, at the hands of the secular power, imprisonments, tortures, "the spoiling of their goods," and perhaps death itself. Indeed, they stake their whole system of doctrine upon this meaning of the Word of God, and they regard these momentous events, which they claim the Bible forecasts, as much a reality as though these events had already transpired. Those events are a reality to them and have the same value in argument, and the same authority in action, as history itself. In their publications and sermons they often adopt the style of the confessor who is already brought to the scaffold, or bound to the stake; they speak out in a tone of defiant, heroic submission, as though the fagots were being kindled and the crown of martyrdom were in full view.



## APPENDIX I

### GENERAL CONFERENCE OF SEVENTH-DAY ADEVENTISTS TRADEMARK - NEW POLICY

On or about November 1, 1988, the North American Division of Seventh-day Adventists meeting in Minneapolis, Minnesota, adopted a new policy, NAD B 80, General Conference of Seventh-day Adventists Trademark, which reads as follows:

#### B 80 GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS TRADEMARK

B 80 05 Statement of Philosophy — The Seventh-day Adventist Church has a historical, evangelical, and proprietary interest in trademarks, service marks, and trade names (referred to collectively herein as “trademarks”) developed by the Church and its related organizations. This policy shall apply to the General Conference of Seventh-day Adventists, the world divisions and departments of the General Conference of Seventh-day Adventists, and other services, organizations, and corporations listed as General Conference entities in the current Seventh-day Adventist Yearbook (referred to collectively herein as “General Conference”). This policy shall also apply to other Seventh-day Adventist entities or organizations utilizing trademarks owned or controlled by the General Conference. It shall be the policy of the General Conference to obtain maximum legal protection under applicable law in harmony with the following procedures and guidelines:

B 80 10 Ownership — All legal rights in any trademark utilized by the General Conference, as defined, shall be vested in the General Conference Corporation with use by a related or subsidiary entity subject at all times to approval and review by the General Conference Corporation.

B 80 15 Registration and Fees — Trademark registration shall be

obtained through the General Conference Trademark Committee pursuant to an enabling action of the General Conference Corporation. Legal fees and other expenses incidental to maximizing trademark protection shall be paid in full by any department, subsidiary, or related organization of the General Conference initiating the process or utilizing the trademark with the understanding that ownership at all times shall be vested in the General Conference Corporation.

B 80 20 Unauthorized Use — It shall be the responsibility of the Trademark Committee to monitor and review any unauthorized use of the trademark, including recommendations to the General Conference Corporation with respect to any legal or other action that should be taken to protect the proprietary interests of the Church as well as its good name. Approval by the General Conference Officers shall be obtained prior to the implementation of any legal action.

B 80 25 Other Trademarks — Seventh-day Adventist entities other than the General Conference shall be entitled to maintain trademark ownership and registration for various marks in their own names so long as such application, ownership, and use does not conflict with existing trademarks, legal rights and/or policy of the General Conference. The General Conference Trademark Committee shall provide assistance and direction to non-General Conference entities as necessary.

B 80 30 Limitation of Rights — Nothing in this policy shall be construed or interpreted as limiting any of the legal rights of the General Conference Corporation with respect to its ownership and use of any and all of its trademarks.

B 80 35 Use of Existing Marks — The use of any existing trademarks including, but not limited to, "Seventh-day Adventists," and/or "Adventist" or any derivative of such trademarks, including, but not limited to "SDA," are authorized as follows:

1. Church entities that have denominational status and are included in the current Seventh-day Adventist Yearbook shall have license to use these trademarks in their names and ministries unless

specifically revoked by the General Conference Corporation. Such trademarks shall not be utilized in commercial endeavors.

2. Local churches and companies may use these trademarks in their names and ministries following approval of status by the local conference or mission. Such trademarks shall not be utilized in commercial endeavors.

3. Lay and professional groups may not utilize trademarks owned by the General Conference Corporation without its express written approval. Application for such use shall be made to the secretary of the Seventh-day Adventist Trademark Committee of the General Conference. Use of such trademarks by lay and professional groups must be solely for noncommercial purposes. Granting such license to use trademarks owned by the General Conference Corporation shall be at the sole discretion of the General Conference based on the following conditions:

a. Recommendation by the local conference or mission that the lay or professional group requesting trademark usage be granted the license;

b. The activities of the lay or professional group shall be in harmony with the teachings and specifically supported by the Seventh-day Adventist Church;

c. The organization's board and membership shall consist of Seventh-day Adventists in good and regular standing;

d. The anticipated use of the trademark shall not be in conflict with previously granted license(s); and

e. The trademark shall be utilized solely in noncommercial functions.

**B 80 40 Right to Revoke** — The General Conference Corporation shall maintain the right to revoke permission for the use of any trademarks by any denominational entity or lay group at any time, with or without cause.

## APPENDIX I

### NEWSPAPER ITEMS

Houston Chronicle, Sunday, September 24, 1989, p. 21A

Bush signs bill to free jailed mom

WASHINGTON (AP) - President Bush signed a bill Saturday designed to free a Washington mother jailed 25 months ago in a bitter child custody dispute, and attorneys filed an emergency motion for her release.

Presidential spokesman Marlin Fitzwater said Bush signed the bill to free Dr. Elizabeth Morgan "out of compassion for her plight."

The bill was approved by Congress amid growing national attention for the case. It applies retroactively to Morgan, who was jailed for failing to produce her 7-year-old daughter, Hilary, for court-ordered visits with the girl's father Dr. Eric Foretich.

Morgan, a prominent plastic surgeon, hid her daughter and went to jail after alleging that Foretich had sexually abused the girl. Foretich has repeatedly denied those charges and at one point offered a \$5,000 reward for information that would help find the girl.

The child's whereabouts, however, remains secret. . . .

The bill takes advantage of Congress' authority to review district laws and, among other things, sets a 12-month cap for civil contempt child-custody jailings. It also contains a so-called sunset provision that means it automatically goes off the books in 18 months.

As clamor over the case grew, the House and Senate accelerated action on the bill. A late-working Senate approved the measure Friday morning, shortly after midnight, and sent it to the president's desk. . . .

As the bill raced to the president, the entire appeals court was reviewing an August decision by a three judge panel that Morgan should go free.

In that earlier decision, the judges ruled that Morgan should be released because the coercive basis for her jailing had become unconstitutionally punitive.



FEB 5 1990

F. SPANIOLO  
CLERK

No. 89-1061

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1989SEVENTH-DAY ADVENTIST CONGREGATIONAL CHURCH  
AND JOHN R. MARIK,  
*Petitioners,*

vs.

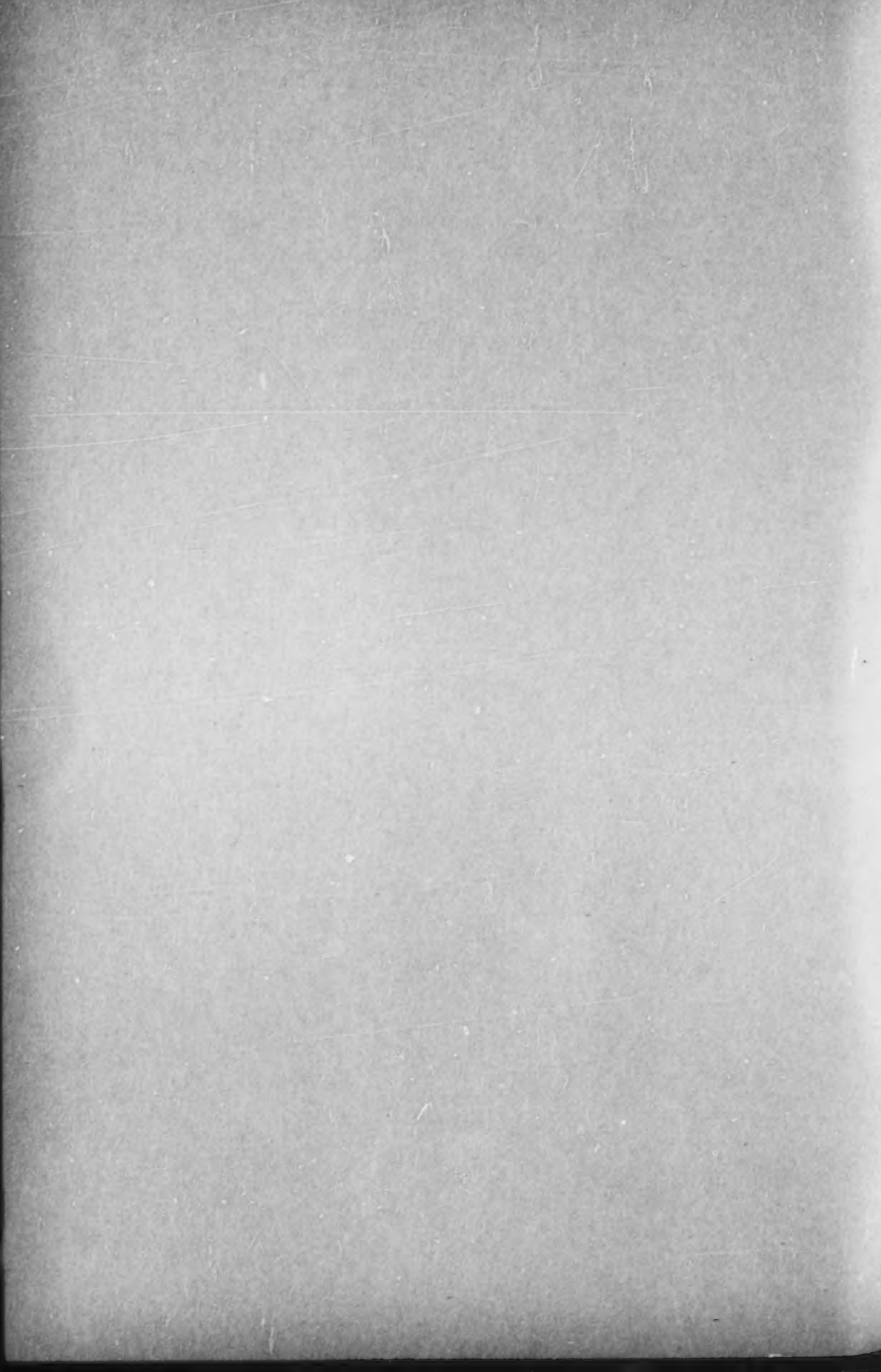
GENERAL CONFERENCE CORPORATION  
OF SEVENTH-DAY ADVENTISTS,  
*Respondent.*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUITBRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUITROY A. VITOUSEK  
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Honolulu, Hawaii 96813  
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and

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## QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals is in conflict with the decision of another federal court of appeals on the same matter?

2. Whether the decision of the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings?

3. Whether this case is ripe for certiorari where the Court of Appeals has reversed the district court's judgment against the Petitioner, has remanded the entire case to the District Court, and has not made any determination adverse to Petitioner?

4. Whether certiorari review of a contempt order is proper where the order was not appealed from and was not ruled upon by the Court of Appeals?

5. Whether certiorari review of the Court of Appeal's refusal to take judicial notice of certain facts is proper and necessary where the Court of Appeals remanded the entire case to the District Court and the Petitioner may attempt to introduce the evidence at trial or move for the District Court to take judicial notice?



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- APPENDIX C Order Holding Defendants in Contempt of Judgment and Permanent Injunction, entered May 12, 1988, in Civil No. 87-274, United States District Court for the District of Hawaii
- APPENDIX D Opinion by Judge Canby for the United States Court of Appeals for the Ninth Circuit, filed October 5, 1989
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- APPENDIX F Brief for Appellants, p. 36, dated June 10, 1988, and filed in Appeals No. 88-2506, United States Court of Appeals for the Ninth Circuit
- APPENDIX G Reply Brief of Appellants, p. 17, dated July 25, 1988, and filed in Appeals No. 88-2506, United States Court of Appeals for the Ninth Circuit

APPENDIX H Letter from Mr. Max Corbett to Chief Judge  
Harold M. Fong, dated January 12, 1990

APPENDIX I Letter from Ms. Lorraine H. Akiba to Chief  
Judge Harold M. Fong, dated January 8, 1990

No. 89-1061

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1989

SEVENTH-DAY ADVENTIST CONGREGATIONAL CHURCH  
AND JOHN R. MARIK,

*Petitioners,*

vs.

GENERAL CONFERENCE CORPORATION  
OF SEVENTH-DAY ADVENTISTS,

*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

Respondent General Conference Corporation of Seventh-day Adventists respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Ninth Circuit Court of Appeals' decision in this case.

## 1. CITATIONS TO OPINIONS BELOW

A Judgment and Permanent Injunction was entered by the United States District Court for the District of Hawaii on December 8, 1987, in *General Conference Corporation of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church, et al.*, Civ. No. 87-274, which was not published. A copy is attached hereto as Appendix A.

An Order Denying Defendants' Motion to Set Aside Judgment, to Dismiss or for New Trial, for More Definite Statement, and to Strike was entered by the United States District Court for the District of Hawaii on March 16, 1988, in *General Conference Corporation of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church, et al.*, Civ. No. 87-274, which was not published. A copy is attached hereto as Appendix B.

An Order Holding Defendants in Contempt of Judgment and Permanent Injunction was entered by the United States District Court for the District of Hawaii on May 12, 1988, in *General Conference Corporation of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church, et al.*, Civ. No. 87-274, which was not published. A copy is attached hereto as Appendix C.

An Opinion by Judge Canby for the United States Court of Appeals for the Ninth Circuit was filed on October 5, 1989 in *General Conference Corporation of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church, et al.*, No. 88-2506, which has not yet been published. A copy is attached hereto as Appendix D.

## 2. STATEMENT OF THE CASE

### 2.1 *Statement Of Facts*

Respondent General Conference Corporation of Seventh-day Adventists ("the General Conference") is the undisputed exclusive owner of its incontestable U.S. Trademark and Service Mark Registration No. 1,177,185 registered November 10, 1981 for the name "SEVENTH-DAY ADVENTIST" used in

connection with its ministry, services, advertising, activities, products, and goods. The registration will remain in full force and effect until November 10, 2001. On June 16, 1987, the U.S. Patent and Trademark Office issued official notice confirming acceptance of the Section 8 and 15 Affidavits for Registration No. 1,177,185 and fulfillment of all statutory requirements by the General Conference with respect to such registration, thereby rendering the registration incontestable.

The General Conference is the first legal user of its exclusive trade name, trademark, and service mark "SEVENTH-DAY ADVENTIST" in interstate commerce continuously from 1860 to present date for the goods and services recited in Registration No. 1,177,185. The General Conference first used its exclusive trade name, trademark, and service mark "SEVENTH-DAY ADVENTIST" for its ministry, churches, services, activities, instructions, goods, products, and advertising prior to any use of the name by Petitioners John R. Marik ("Marik") and Seventh-day Adventist Congregational Church ("SDACC").

Without the consent of the General Conference, Petitioners Marik and SDACC have adopted and commercially used the General Conference's registered name, trademark, and service mark "SEVENTH-DAY ADVENTIST" in their church, ministry, services, advertising, activities, instructions, products, and goods in Hawaii. This infringing use of "SEVENTH-DAY ADVENTIST" by Petitioners continues to this date.

## *2.2 Procedural Background*

The General Conference filed a Complaint asserting claims for trademark infringement, unfair competition, and injunctive relief on April 9, 1987. Marik and SDACC filed an Answer to the Complaint on May 18, 1987. Counsel for the General Conference notified Marik on behalf of himself and SDACC that Defendants' Answer was not in compliance with the Federal Rules of Civil Procedure and was subject to being struck or deemed an admission of the allegations in the Complaint. The General Conference offered to give (and subsequently allowed) Petitioners an extension of time to file an amended

answer by June 15, 1987. Marik and SDACC did not file an amended answer by the June 15, 1987 deadline.

On July 15, 1987, a Motion for Judgment on the Pleadings, or in the Alternative, Motion to Strike was filed by the General Conference and served upon Marik and SDACC. The motion was set for hearing on September 8, 1987 before Judge Roger Foley.

On August 4, 1987, Petitioners filed a pleading entitled "Denial of Plaintiff's Allegations and Appeal to the Court on Behalf of Defendant." On August 19, 1987, Petitioners filed a pleading entitled "Answer to the Complaint and an Appeal to the Court on Behalf of Defendants and the Answer and Denial of the Complaint." Marik and SDACC also filed a Scheduling Conference Statement on September 3, 1987. No other pleadings were filed by Petitioners in response to the Motion for Judgment on the Pleadings, or in the Alternative, Motion to Strike.

On September 1, 1987, the parties were notified that Plaintiff's motion for judgment on the pleadings was granted. Plaintiff's alternative motion to strike was denied on the merits. The Order Granting Motion for Judgment on the Pleadings and Denying Motion to Strike was entered by Judge Roger Foley on September 24, 1987. On December 8, 1987 the court entered the Judgment and Permanent Injunction in favor of the General Conference and against Marik and SDACC. Appendix A.

On December 28, 1987, Marik and SDACC filed a Motion for Suspension of Injunction and Order Pending Hearing and Ruling on Motion to Set Aside Judgment, to Dismiss or for New Trial, for a More Definite Statement, and to Strike Under FRCP 59 and FRCP 12 and Motion to Set Aside Judgment, to Dismiss or for New Trial, for a More Definite Statement, and to Strike Under FRCP 59 and FRCP 12. A hearing on the Motion was held before Judge Russell Smith on February 22, 1988, and on March 16, 1988 the court entered its Order Denying the Motion. Appendix B.

In the meantime, on January 12, 1988, Marik and SDACC filed their Compliance Report which unequivocally admitted



(1) continued use of the General Conference's registered mark "SEVENTH-DAY ADVENTIST" in connection with Defendants' church services and activities associated therewith; and (2) continued possession of a sign, literature, and other SDACC produced materials bearing the name "SEVENTH-DAY ADVENTIST" in violation of the Judgment and Permanent Injunction entered on December 8, 1987. Consequently, on February 1, 1988, the General Conference filed and served upon Petitioners its Motion for Order to Show Cause Why Defendants Should Not be Held in Contempt Because of Defendants' Violation of Judgment and Permanent Injunction.

An Order to Show Cause Why Defendants Should Not be Held in Contempt was entered on April 20, 1988. A full hearing on the order to show cause took place on May 9, 1988 before Judge Dickran Tevrizian. At the May 9, 1988 hearing, the court found Marik and SDACC in contempt of the Judgment and Permanent Injunction. However, the court allowed Defendants a three day grace period to comply with the outstanding Judgment and Permanent Injunction before the court's order would be entered. Marik and SDACC refused to do so and the Order Holding Defendants in Contempt of Judgment and Permanent Injunction was entered on May 12, 1988. Appendix C.

Petitioners filed a Notice of Appeal on April 7, 1988, prior to the hearing on the order to show cause, only appealing from the December 8, 1987 Judgment and Permanent Injunction and the March 16, 1988 Order Denying Defendants' Motion to Set Aside Judgment. Appendix E. Subsequent to the filing of their Notice of Appeal, Marik and SDACC never sought a stay of the judgment pending appeal from either the District Court or the Court of Appeals under Fed. R. Civ. Pro. 62 or Fed. R. App. Pro. 8. Marik and SDACC also failed to amend their Notice of Appeal or file a new notice of appeal to appeal from the contempt order pursuant to Fed. R. App. Pro. 3 and 4.

Marik and SDACC have never filed an appeal from the May 12, 1988 Order Holding Defendants in Contempt. On appeal before the Ninth Circuit, Marik and SDACC devoted three sentences in their Brief for Appellants, p. 36, to an argument that the District Court's refusal to hear certain evidence during

the order to show cause hearing deprived them of procedural due process. Appendix F. This was the first time the argument was made by Petitioners. They raised the argument again in a paragraph in their Reply Brief of Appellants, p. 17. Appendix G.

On appeal, the Ninth Circuit Court held that Marik and SDACC had raised issues of material fact or presented affirmative defenses to preclude the judgment on the pleadings. The judgment was reversed and the case was remanded to the district court for further proceedings. Appendix D. However, the Court of Appeals pointed out that the contempt order had not been brought before it and declined to rule upon Marik and SDACC's attempt to challenge the contempt order. *Id.* The Court explained that relief in this regard must come from the District Court. *Id.* The Ninth Circuit issued its decision on October 5, 1989. *Id.*

Since then, Marik and SDACC have not attempted to seek relief from the contempt order in the District Court despite the Court of Appeals' suggestion that they do so and despite the remand of this case back to the District Court. Had Petitioners moved in the District Court to set aside the contempt order in October, the matter would have been resolved by now. Petitioners' counsel in fact refuses to seek relief at the District Court level. (See Mr. Max Corbett's letter to Chief Judge Harold M. Fong, dated January 12, 1990, Appendix H, and Ms. Lorraine H. Akiba's letter to Chief Judge Harold M. Fong, dated January 8, 1990, Appendix I.)

Instead, Petitioners insist upon pursuing this issue through certiorari review, thereby complicating the matter and delaying the proceedings below. However, it should be noted that after being apprehended on December 15, 1989, Marik was released from custody on December 20, 1989.

### 3. SUMMARY OF ARGUMENT

Petitioners cite two reasons for certiorari review: (1) the Court of Appeals' decision conflicts with the decision of another federal court; and (2) the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings. However, Petitioners have not demonstrated such

grounds from the decision and record below. In support of their contentions, Petitioners cite decisions from state courts and fail to explain how the Court of Appeals decision conflicts with or departs from federal law. Furthermore, the Court of Appeals has not ruled in any manner adverse to the authorities cited by Petitioners. It instead reversed a judgment against Petitioners and remanded the case to the District Court for further proceedings.

Because this case has been remanded, it is not ripe for certiorari review. Petitioners also improperly seek certiorari review of a District Court contempt order which was never brought before the Court of Appeals. The Court of Appeals did not rule upon the order because Petitioners have never filed an appeal from the order.

Petitioners also would have this Court take judicial notice of extrinsic and irrelevant facts never made part of the record below. Judicial notice by the Supreme Court of facts raised for the first time on appeal would be totally contrary to the Supreme Court's task during certiorari review, that being to review factual findings from the lower courts rather than to determine facts *de novo* like a trial court. This is also unnecessary, because Petitioners may still attempt to introduce such alleged "facts" to the District Court on remand.

#### 4. ARGUMENT

*4.1 The Court of Appeals Has Not Rendered A Decision In Conflict With The Decision of Another Federal Court Or Which So Far Departed From The Accepted And Usual Course Of Judicial Proceedings*

Rule 17, Rules of the Supreme Court of the United States, provides: "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Rule 17 further sets forth examples to indicate the character of reasons that will be considered, and Petitioners, in the section of its Petition under the heading "*REASONS FOR GRANTING THE WRIT*," cite two of those as *the* reasons for granting a writ of certiorari in this case. First, Petitioners contend that the decision below conflicts with the tenor of decisions of the Supreme

Court and other federal courts. Second, they contend that the decision below has so far deviated from the accepted and usual course of judicial proceedings. —

However, Petitioners then proceed to repeat their arguments made before the Court of Appeals without any discussion of how the court's decision either conflicts with the tenor of decisions of other federal courts or deviates from the accepted and usual course of judicial proceedings. The only exception occurs at page 21 of the Petition where Petitioners argue that until the present case there was unanimity in all federal circuit courts with regard to the review of a civil contempt order on appeal. (The decision on the contempt order shall be addressed more particularly, *infra*.)

A review of the sources of Petitioners' authorities relied upon in support of their arguments reveals that the Court of Appeals has not rendered a decision which conflicts with or deviates from federal law. For instance, Petitioners' argument that the Court of Appeals erred in refusing to take judicial notice of voluminous religious documentary evidence is grounded on *state* court decisions in which certain religious matters were judicially noticed. Petition, p. 10. Similarly, Petitioners' argument that the trademark, trade name and service mark at issue in this case is a generic term relies on a decision of the New Jersey Supreme Court. Petition, p. 12. Petitioners' argument that they are entitled under guarantees of freedom of religion and speech to use "Seventh-day Adventist" is also supported by citations to state court decisions. Petition, p. 13. This legal deficiency in demonstrating any alleged conflict with federal law prevails throughout the entire Petition.

Furthermore, the Court of Appeals did not decide anything contrary to the authorities cited by Petitioners, whether the authorities be state or federal authorities. The Court of Appeals' holdings are summarized by it as follows: —

[1] A judgment on the pleadings is a decision on the merits and it is reviewed *de novo*. [2] Defendants filed two pleadings which the district court construed as "answers." If these "answers" are construed liberally because Marik

submitted them pro se, they set forth two points that either raise questions of material fact or present affirmative defenses. [3] Defendants claimed that the name Seventh Day Adventist is generic because it refers to a religion rather than the church organization. Defendants are not liable for trademark infringement if they prove that the mark is generic. Because this defense was raised in the answer, it bars a judgment on the pleadings. [4] Also in the answer, Marik made several factual assertions regarding the likelihood of confusion, and these factual allegations create a material issue of fact that should not have been determined in a judgment on the pleadings.

Appendix D. These are the legal pronouncements that the appellate court's decision stood for. Petitioners did not cite a single authority to challenge any of the above.

The Court of Appeals' decision could be construed as favorable to Petitioners, for it reversed the District Court's Judgment against Petitioners. The Court of Appeals did not make any determination as to the merits of the authorities cited in the Petition, rather it remanded the case. Nor did it cite or create any law contrary to any authorities relied upon by Petitioners.

Therefore, this is not a case where a federal court of appeals has rendered a decision in conflict with the decision of another federal court or so far departed from the usual course of judicial proceedings. Accordingly, the Petition should be denied.

#### 4.2 *This Case Is Not Ripe For Certiorari*

Petitioners have not established any grounds for certiorari review to be invoked in this case. Similarly, this Court denied a petition for certiorari in *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Company*, 389 U.S. 327 (1967), which involved an appeal from a contempt order of the United States District Court for the District of Columbia entered against the Brotherhood of Locomotive Firemen and Enginemen. The Court of Appeals for the District of Columbia Circuit ruled on some legal issues and remanded to the district court for determination of others. The union petitioned this Court for certiorari to review the adverse rulings made by the D.C. Circuit Court. This Court denied the petition

on the grounds that "because the Court of Appeals remanded the case, it is not ripe for review by this Court." *Id.*, 389 U.S. at 328.

The instant case is even less ripe for certiorari review than was *Brotherhood of Locomotive Firemen*, *supra*, where the D.C. Circuit Court had made some rulings adverse to the petitioner. The Ninth Circuit Court has merely remanded the case to the District Court for further adjudication on the merits. While the Court of Appeals refused to take judicial notice of purported "facts" raised for the first time on appeal and to rule on the contempt order which was never appealed, it did not preclude the District Court upon remand from taking judicial notice or from providing Petitioners' relief from the contempt order. Moreover, the Petitioners had and still have adequate opportunity to seek relief and a remedy below in the District Court, which they repeatedly and intentionally refuse to do. Therefore, this case is not ripe for certiorari review.

#### 4.3 *This Court Should Not Review The Contempt Order Because That Order Was Not Appealed And Not Addressed By The Court Of Appeals*

This Court has held that it will not review matters not raised in the court of appeals and not addressed by that court. *Rogers v. Lodge*, 458 U.S. 613, 628 n. 10 (1982). In this case, the May 12, 1988 contempt order of the District Court was not appealed to the Court of Appeals. Petitioners failed to file any notice of appeal stating that they were appealing from the contempt order as required by Fed. R. App. Pro. 3. For that very reason, the Court of Appeals refused to rule on the contempt order. Accordingly, it would be improper for this Court to review the contempt order.

Petitioners cite a string of cases in support of the proposition that "[a]n order of civil contempt is reviewable on an appeal taken from the final judgment in the suit out of which the contempt proceedings arose." Petition, p. 21. Petitioners argue that the Court of Appeals' refusal to rule on the contempt order in this case is contrary to the cited cases. However, the cited cases all involve the question of whether a civil contempt order can be appealed from *before* a final judgment in the case, and



those cases hold that a civil contempt order is interlocutory and cannot be filed until there has been a final judgment. That is an entirely different issue from Petitioners' suggestion that the civil contempt order must be considered during an appeal of the final judgment, regardless of whether the order has been specifically appealed from.

Only one of those cases cited by Petitioners, *Halderman v. Pennhurst State School & Hospital*, 673 F.2d 628 (3rd Cir. 1982), actually involves circumstances similar to this case, and the court ruling on the matter was consistent with the Court of Appeals in this case. In *Halderman*, as in this case, a contempt order had been entered by a district court *after* a permanent injunction had been entered and appealed from. The Third Circuit Court of Appeals held that the contempt order was properly appealable. *Id.* at 636. Thus, contrary to Petitioners' contentions, it is not necessary that a civil contempt order be reviewed simultaneously with an appeal of the judgment upon which the contempt order is based. Where the contempt order is entered after the final judgment has been appealed from, the proper procedure is for the party to file a separate appeal from the contempt order. Because Petitioners knowingly and intentionally failed to appeal from the contempt order in this case, the Court of Appeals was correct in refusing to rule on the order.

Furthermore, Petitioners are not without available avenues of relief from the contempt order. The case has been remanded to the District Court where Petitioners are free to move to set aside the order. There is no reason why this Court's time and resources should be expended on a matter which may be resolved at the district court level through a simple motion.

#### 4.4 *The Petitioners Have Introduced Evidence Which Was Not Before The Courts Below*

Petitioners submit evidence in their Petition for Writ of Certiorari which was never presented to the District Court nor the Court of Appeals. The following is a list of publications from which the Petitioners have gleaned statements in support of their arguments and alleged as "established facts":

*A New English Dictionary on Historical Principals*, Henry Bradley, 1914 ed.

*New Werner Twentieth Century Edition of Encyclopedia Britannica*, Vol. 25, 1905 ed., p. 52

*Seventh-day Adventist Encyclopedia*, 106 ed., pp. 1179, 435

*The Encyclopedia Americana*, Vol. 24, 1972 ed., p. 620

*The Encyclopedia of American Religions*, 2nd ed. 1987, J. Gordon Melton, pp. 77, 79-81

*The Westminster Dictionary of Church History*, Jerald C. Brauer, 1971 ed., pp. 763, 764

*Universal Dictionary of the English Language*, Robert Hunter and Charles Morris, 1987 ed.

*The World Book Encyclopedia*, Vol. 17, 1989 ed., p. 326

*A History of Churches in the United States and Canada*, Robert T. Handy, 1977 ed., pp. 194-196, 294, 374

*Bible*: John 14:3 NKJ; Revelation 14:9-12 NKJ; Revelation 16:1,2 NKJ

*Seventh-day Adventist Renounced*, D.M. Canright, 1889 ed., pp. 25, 20, 21

*Houston Chronicle*, Sunday, September 24, 1989, p. 21A

None of the alleged "evidence" presented from these sources has been established, authenticated, or otherwise verified as required by Fed. R. Evid. 201 and Fed. R. Civ. Pro. 56(e) to allow judicial notice of such alleged facts. Accordingly, the Court of Appeals properly refused to take judicial notice of such alleged facts.

Petitioners would now have this Court grant certiorari on the basis of evidence that has never been before the lower courts, and then presumably would have this Court engage in *de novo* fact finding like a trial court. However, this would be contrary to the Supreme Court's task during certiorari review: "[O]ur task is limited." [Citation omitted.] It is not for us to pass upon the myriad factual and legal issues as though we



were trying this case de novo." *New York, NH&H Railroad Co. First Mortgage 4% Bondholders Committee v. United States*, 399 U.S. 392, 435 (1970).

Accordingly, it would be improper for this Court to make the kind of review that Petitioners seek.

*4.5 Certiorari Review Of The Court of Appeals' Refusal To Take Judicial Notice Of Proposed Facts Raised For The First Time On Appeal Is Unwarranted*

Petitioners had argued to the Court of Appeals that the court should take judicial notice of an extensive number of documents and publications, which the Court of Appeals correctly declined to do. Petitioners now argue that it was error not to take judicial notice. Regardless of the merits of such arguments, it is not necessary for this Court to decide whether the proposed facts should have been judicially noticed because this case has been remanded to the District Court. Petitioners will have ample opportunity to seek introduction of that evidence properly at the trial level. Furthermore, Petitioners are not precluded from moving the District Court to take judicial notice.

In effect Petitioners are asking this Court to make factual determinations and to take judicial notice of facts like a trial court before Petitioners have attempted to introduce those facts in the remanded proceedings at the district court level. The question of judicial notice is properly one for the trial court to consider. For this Court to review the judicial notice question now would amount to an unjustified departure from normal appellate procedure and improper fact finding outside the scope of appellate review.

## 5. CONCLUSION

For all the reasons set forth herein, the General Conference submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted, this 8th day of February, 1990.

**LORRAINE H. AKIBA**

---

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*Attorneys for Plaintiff*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

GENERAL CONFERENCE	) CIVIL NO. 87-274
CORPORATION	)
OF SEVENTH-DAY	) JUDGMENT AND
ADVENTISTS,	) PERMANENT
	) INJUNCTION

*Plaintiff,* )

vs. )

SEVENTH-DAY ADVENTIST	)
CONGREGATIONAL CHURCH,	)
and JOHN R. MARIK,	)

*Defendants.* )

---

## JUDGMENT AND PERMANENT INJUNCTION

Pursuant to the Order Granting Motion for Judgment on the Pleadings, and Denying Motion to Strike entered herein on September 24, 1987 and based upon the pleadings and other papers filed herein, judgment as to all matters alleged in the Complaint is hereby entered in favor of Plaintiff GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS and against Defendants SEVENTH-DAY ADVENTISTS CONGREGATIONAL CHURCH and JOHN R. MARIK.

The Court hereby further orders, adjudges and decrees that Defendants SEVENTH-DAY ADVENTISTS CONGREGATIONAL CHURCH and JOHN R. MARIK, and each of them, and all of the their agents, servants, employees and attorneys, and all persons in active concert or participation with them (hereinafter collectively referred to as the "Defendants") are PERMANENTLY ENJOINED AND RESTRAINED:

(a) from using, promoting, advertising, imitating, copying or in any way displaying any name or mark that includes the term "SEVENTH-DAY ADVENTIST", or any term that is confusingly similar to "SEVENTH-DAY ADVENTIST", or is a simulation, reproduction, counterfeit, copy, colorable imitation, abbreviation (including, without limitation, the abbreviation "SDA" and any colorable imitations of "SDA"), or other designation thereof, in connection with the offering, promotion, advertising or rendering of services or the sale or distribution of any literature or other goods, or in connection with any other activity, in a manner likely to cause confusion, or to cause mistake or to deceive;

(b) from using the term "SEVENTH-DAY ADVENTIST", or any term that is confusingly similar to "SEVENTH-DAY ADVENTIST", or is a simulation, reproduction, counterfeit, copy, colorable imitation, abbreviation (including, without limitation, the abbreviation "SDA" and any colorable imitations of "SDA"), or other designation thereof, in any trade name or corporate name of any entity controlled by the Defendants, or by any of them, and specifically from retaining the term

"SEVENTH-DAY ADVENTIST" or "SDA" in the name of the Defendants' church services, or in any offering, promotion, advertising or rendering of such services;

(c) from reproducing, counterfeiting, copying or colorably imitating the mark "SEVENTH-DAY ADVENTIST" and applying such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive;

(d) from using any false designation of origin or false description, or representation, or performing any act, which can, or is likely to, lead the public or any individual members thereof, to believe that the Defendants' services are in any manner associated, affiliated or connected with Plaintiff's services, or that Plaintiff sponsors, approves or authorizes the Defendants' services;

(e) from representing or in any way suggesting or implying that the church services of the Defendants are in any manner associated, affiliated or connected with Plaintiff's church services, or that Plaintiff sponsors, approves or authorizes Defendants' church services;

(f) from representing or in any way suggesting or implying that any of the services, literature, products or goods of Defendants are in any manner associated or connected with Plaintiff's "SEVENTH-DAY ADVENTIST" services, literature, products or goods, or that Plaintiff sponsors, approves or authorizes Defendants' services, literature, products or goods;

(g) from making any other false or misleading representation with respect to the authenticity or standard or nature of either Plaintiff's or Defendants' services or goods; —

(h) from applying for or registering any service mark, trademark, trade name, certification mark or collective mark that is a reproduction, simulation, counterfeit, copy, colorable imitation, abbreviation (including, without limitation, the

abbreviation "SDA" and any colorable imitations of "SDA"), or other designation of Plaintiff's "SEVENTH-DAY ADVENTIST" mark with any governmental entity;

(i) from engaging in any other activity constituting an infringement of Plaintiff's service mark, trademark and trade name "SEVENTH-DAY ADVENTIST", or of Plaintiff's rights in and to such service mark, trademark and trade name;

(j) from engaging in any other activity constituting unfair competition with Plaintiff or constituting unfair or deceptive trade practices;

(k) from creating any confusion as to source, sponsorship or approval as to the Plaintiff's or the Defendants' services and goods; and

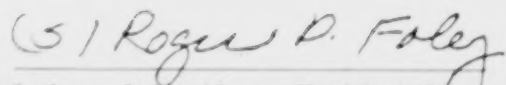
(l) from taking any actions that may injure Plaintiff's goodwill and reputation by way of imitation, misrepresentation, advertising, fraud, passing off or deception.

**DEFENDANTS ARE HEREBY ORDERED:**

(a) to deliver up to Plaintiff for destruction all labels, signs, prints, advertising materials, literature, packages, wrappers and other materials in the possession or custody of the Defendants, or any of them, or under their control, bearing the term "SEVENTH-DAY ADVENTIST", or any term that is confusingly similar to "SEVENTH-DAY ADVENTIST", or is a simulation, reproduction, counterfeit, copy, colorable imitation, abbreviation (including, without limitation, the abbreviation "SDA" and any colorable imitations of "SDA"), or other designation thereof, and all plates, molds, matrices and other means of making the same; and

(b) to file with this Court and to serve on the Plaintiff within thirty (30) days after service of this Judgment and Permanent Injunction, a written report under oath setting forth in detail the manner and form in which the Defendants have complied with this injunction.

DATED: Honolulu, Hawaii; November 30, 1987.

  
Judge of the Above-Entitled Court

[GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY  
ADVENTISTS v. SEVENTH-DAY ADVENTIST CONGREGATIONAL  
CHURCH AND JOHN R. MARIK, CIVIL NO. 87-274; Judgment and  
Permanent Injunction]





IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

GENERAL CONFERENCE	)	CIVIL NO. 87-0274
CORPORATION	)	
OF SEVENTH-DAY	)	ORDER DENYING
ADVENTISTS,	)	DEFENDANTS'
	)	MOTION TO SET
	<i>Plaintiff,</i> )	ASIDE JUDGMENT,
	)	TO DISMISS OR
vs.	)	FOR NEW TRIAL,
	)	FOR A MORE
SEVENTH-DAY ADVENTIST	)	DEFINITE
CONGREGATIONAL CHURCH	)	STATEMENT, AND
and JOHN R. MARIK,	)	TO STRIKE
	)	
	<i>Defendants.</i> )	
_____	)	

**ORDER DENYING DEFENDANTS' MOTION TO SET  
ASIDE JUDGMENT, TO DISMISS OR FOR NEW  
TRIAL, FOR A MORE DEFINITE STATEMENT,  
AND TO STRIKE**

Initially I thought that the motions were untimely. I was wrong in that, and now address the merits of the defendants' motions.

Plaintiff is a corporation organized under the laws of the District of Columbia. Defendant Marik is an individual and defendant Seventh Day Adventist Congregational Church is a non-profit religious corporation organized under the laws of Hawaii.

The complaint, which seeks to protect a trade name, alleges that the plaintiff is the owner of an incontestable trade mark for the name "Seventh Day Adventist" registered, November 10, 1981, U. S. Trademark and Service Mark registration No. 1,177,185 for use in connection with its religious activities. The complaint alleges that the trade mark has been used by the plaintiff since 1860 continuously, worldwide; that the ministry conducts services in 200 countries, has 4,500,000 members, 25,000 churches, and 10,000 ordained ministers; that long after the plaintiff's first use of the trade-name, the defendants, without plaintiff's consent, commenced a ministry using the name "Seventh-Day Adventist", which is likely to cause confusion in the minds of the public.

The complaint was filed April 9, 1987.

On May 18, 1987, Marik (who is not admitted to practice in this court), filed a paper in behalf of himself and the defendant church. The paper filed is not responsive to the complaint. It does not deny that the plaintiff has the registered trade name and does not deny its first use. It states that the defendants do not intend to cause confusion and that they find strange the idea that a church and its message should be a business.

The plaintiff, on July 15, 1987, filed a motion for judgment on the pleadings and noticed it for hearing on September 8, 1987. There was no response to the motion, but a paper was filed on August 4, 1987, called a "Denial of Plaintiff's Allega-

tions". The denial does not deny any of the facts stated in the complaint. It does argue that religious issues have no relevance to the purposes of the court; that religious activities are not subject to secular laws; and that the defendants have no lawyer because that don't think God would want them to. On September 3, Marik filed another paper stating that it is a violation of "our" conscience to enter into litigation because "by doing so our Lord would not be glorified".

On this state of the record and at the time noticed for the hearing, Judge Foley granted the Motion for Judgment on the Pleadings (not, as defendant contends, a motion for summary judgment) and subsequently entered a judgment enjoining the defendants from using the name.

As I see it, Judge Foley took the view that the words "Seventh-Day Adventist" could be a trade name subject to registration, and that the plaintiff's use of the words "Seventh-Day Adventist Congregationalist Church" was apt to be misleading. This approach to the problem was taken in the case of *Purcell v. Summers*, 145 F.2d 959 (4th Cir. 1944). In the approach taken by the Supreme Court of New Jersey in the case of *Christian Science Bd. of directors v. Evans*, 520 A.2d 1347, 105 N.J. 297 (N.J. 1987), the words "Seventh-Day Adventist" would be treated as generic and, if so treated, could not be appropriated as a trade mark. They could be used by anyone practicing the Seventh-Day Adventist faith.

I think that there is but one question here; that it is a question of law, and that Judge Foley has decided it.

As I see it, there are no grounds upon which the judgment should be set aside. I think the court had jurisdiction, that the complaint did state a claim, and that there was no fatal non joinder. The proceedings leading to the judgment in the pleadings cannot be faulted. A new trial might be granted on the ground that the district court was wrong.

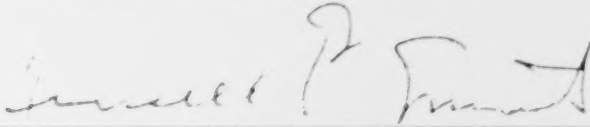
I do not believe that by making a motion for new trial instead of taking an appeal a party should be able to require a district judge to perform the functions of the Court of Appeals.

The Motions are each and all DENIED. The Motion for sanctions is DENIED, without prejudice. The problem of sanc-

tions can be considered after the judgment has become final on appeal.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, March 16, 1988.

A handwritten signature in cursive script, appearing to read "Samuel R. Smith", is written over a horizontal line.

UNITED STATES DISTRICT JUDGE

GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS v. SEVENTH-DAY ADVENTIST CONGREGATIONAL CHURCH, ET AL., CIVIL NO. 87-0274—DENIAL OF MOTION TO SET ASIDE JUDGMENT, TO DISMISS OR FOR NEW TRIAL, FOR A MORE DEFINITE STATEMENT, AND TO STRIKE.

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SEVENTH-DAY ADVENTISTS

IN THE UNITED STATES DISTRICT  
FOR THE DISTRICT OF HAWAII

GENERAL CONFERENCE )

CORPORATION OF )

SEVENTH-DAY ADVENTISTS, )

*Plaintiff,* )

vs. )

SEVENTH-DAY ADVENTIST )

CONGREGATIONAL CHURCH, )

and JOHN R. MARIK, )

*Defendants.* )

CIVIL ACTION

NO. 87-274

ORDER HOLDING

DEFENDANTS IN

CONTEMPT OF

THE JUDGMENT

AND

PERMANENT

INJUNCTION

## ORDER HOLDING DEFENDANTS IN CONTEMPT OF THE JUDGMENT AND PERMANENT INJUNCTION

On April 20, 1988, the Court issued an Order to Show Cause Why Defendants Should Not Be Held in Contempt Because of Defendants' Violation of Judgment and Permanent Injunction. The order to show cause came on for hearing before the Honorable Dickran Tevrizian, Jr. on May 9, 1988 at 9:00 o'clock, a.m. Defendants SEVENTH-DAY ADVENTIST CONGREGATIONAL CHURCH and JOHN R. MARIK were represented by their counsel, Max A. Corbett, and Plaintiff GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS was represented by its counsel, Lorraine H. Akiba.

The Court having read the written memoranda and other pleadings of counsel for Plaintiff and Defendants, having heard the oral arguments of counsel, having considered the affidavits and arguments in response to the order to show cause, and being fully advised and familiar with the entire record of the case, finds and holds as follows:

The Judgment and Permanent Injunction entered herein on December 8, 1987 ordered Defendants to immediately cease and desist from using, promoting, advertising, imitating, copying, or displaying the service mark, trademark, and trade name "Seventh-Day Adventist" and to deliver to Plaintiff for destruction all labels, signs, prints, advertising materials, literature, packages, wrappers, and other materials in the possession of the Defendants, or any of them, or under their control, bearing the term "Seventh-Day Adventist," or any term that is confusingly similar to "Seventh-Day Adventist," or is a simulation, reproduction, counterfeit, copy, colorable imitation, abbreviation (including, without limitation, the abbreviation "SDA" and any colorable imitations of "SDA"), or other designation thereof, and all plates, molds, matrices, and other means of making the same. Defendants were also ordered to file with the Court and to serve on Plaintiff within 30 days of the Judgment date a written report under oath setting forth in detail

the manner and form in which the Defendants complied with the injunction. The Judgment and Permanent Injunction is a valid order signed by United States District Judge Roger Foley and remains in full force and effect.

On January 8, 1988, Defendants filed a Compliance Report which expressly stated that they are continuing to use the name "Seventh-Day Adventist" and to have in their possession signs, literature, and other materials bearing the trademark name "Seventh-Day Adventist" which have not been delivered to Plaintiff in willful violation of the Permanent Injunction.

Defendants also stated that they were advised by their attorney that pursuant to the provisions of 15 U.S.C. § 1116(a), the Judgment and Permanent Injunction entered on December 8, 1987 could be enforced by "proceedings to punish for contempt, or otherwise." Defendants reiterated that they fully recognized and understood that the punishment for their willful and conscious non-compliance with the injunction could result in their commitment to jail and the imposition of such other penalties as the Court may deem just and proper.

It is undisputed from the records and files in this case that Defendants have failed to comply with the Judgment and Permanent Injunction. Defendants have unequivocally stated that they continue to violate this Court's orders.

The Court holds that Defendants SEVENTH-DAY ADVENTIST CONGREGATIONAL CHURCH and JOHN R. MARIK, individually and collectively, are in violation of the Judgment and Permanent Injunction entered herein on December 8, 1987. The Court holds Defendants, individually and collectively, in civil contempt of court by reason of their willful violation of this Court's Judgment and Permanent Injunction. Pursuant to 18 U.S.C. § 401, the Court imposes a fine of \$500.00 per day against Defendant SEVENTH-DAY ADVENTIST CONGREGATIONAL CHURCH, individually and collectively; and a fine of \$500.00 per day against Defendant JOHN R. MARIK, individually and collectively, until full compliance with the Judgment and Permanent Injunction by said Defendants is obtained. Defendants are ordered to pay such fines to the Clerk of the Court until full compliance is obtained.

The Court further orders that with respect to Defendant JOHN R. MARIK, individually and as the President of Defendant SEVENTH-DAY ADVENTIST CONGREGATIONAL CHURCH, a warrant shall be issued for his arrest until full compliance with the Judgment and Permanent Injunction by Defendants is obtained. The arrest warrant will be issued and effective immediately upon the date this order is signed.

The Court also awards to Plaintiff and against Defendants SEVENTH-DAY ADVENTIST CONGREGATIONAL CHURCH and JOHN R. MARIK, individually and collectively, the amount of \$13,929.21 for reasonable attorneys' fees and costs incurred by Plaintiff herein.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, May 12 1988.

DICKRAN TEVRIZIAN, JR.

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UNITED STATES DISTRICT JUDGE

[GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS v. SEVENTH-DAY ADVENTIST CONGREGATIONAL CHURCH, et al.; CIVIL NO. 87-274—ORDER HOLDING DEFENDANTS IN CONTEMPT OF JUDGMENT AND PERMANENT INJUNCTION]



FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

GENERAL CONFERENCE  
CORPORATION OF SEVENTH-DAY  
ADVENTISTS,

*Plaintiff-Appellee,*

v.

SEVENTH-DAY ADVENTIST  
CONGREGATIONAL CHURCH;  
JOHN R. MARIK,

*Defendants-Appellants.*

No. 88-2506

D.C. No.

CV-87-0274 RES

OPINION

Appeal from the United States District Court  
for the District of Hawaii

Russell E. Smith, Senior District Judge, Presiding

Argued and Submitted

May 11, 1989—San Francisco, California

Filed October 5, 1989

Before: Procter Hug, Jr., Mary M. Schroeder and  
William C. Canby, Jr., Circuit Judges.

Opinion by Judge Canby

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## SUMMARY

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### Copyright, Patent and Trademark/Courts and Procedure

Reversing and remanding the district court's judgment, the court held that a judgment on the pleadings is improper where a defendant either raises questions of material fact or presents affirmative defenses.

Defendants Seventh-Day Adventist Congregational Church and John Marik appealed a judgment on the pleadings and the issuance of a permanent injunction against them in a trademark infringement action. Plaintiff General Conference Corporation of Seventh-Day Adventists brought a claim against defendants under the Lanham Act, 15 U.S.C. § 1051 et seq., for trademark and service mark infringement, unfair competition, and false designation of origin. Marik, pro se, and allegedly on behalf of the Congregational Church, filed a response and a denial of plaintiff's allegations. Because defendants filed no response to plaintiff's motion for judgment on the pleadings, the district court ordered that it be granted. Defendants' motion to set aside the judgment was denied, and defendants appealed.

[1] A judgment on the pleadings is a decision on the merits and it is reviewed de novo. [2] Defendants filed two pleadings which the district court construed as "answers." If these "answers" are construed liberally because Marik submitted them pro se, they set forth two points that either raise questions of material fact or present affirmative defenses. [3] Defendants claimed that the name Seventh Day Adventist is generic because it refers to a religion rather than the church organization. Defendants are not liable for trademark infringement if they prove that the mark is generic. Because this defense was raised in the answer, it bars a judgment on the pleadings. [4] Also in the answer, Marik made several factual assertions regarding

the likelihood of confusion, and these factual allegations create a material issue of fact that should not have been determined in a judgment on the pleadings.

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### COUNSEL

Max A. Corbett and Peter N. Fowler, Annandale, Virginia, for the defendants-appellants.

Lorraine H. Akiba, Honolulu, Hawaii, for the plaintiff-appellee.

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### OPINION

CANBY, Circuit Judge:

Defendants Seventh-Day Adventist Congregational Church and John Marik appeal a judgment on the pleadings and the issuance of a permanent injunction against them in a trademark infringement action. We reverse and remand for further proceedings.

### BACKGROUND AND PROCEEDINGS BELOW

The General Conference Corporation of Seventh-Day Adventists sued the Seventh-Day Adventist Congregational Church, located in Kealahou, Hawaii, and its pastor, John R. Marik, under the Lanham Act, 15 U.S.C. § 1051 et seq., for trademark and service mark infringement, unfair competition, and false designation of origin. The General Conference also asserted claims under the common and statutory law of Hawaii relating to trademarks, service marks, trade names, unfair competition, deceptive trade practices, and false advertising. The complaint was filed on April 9, 1987. Marik, pro se, and allegedly on behalf of the Congregational Church, filed

a response on May 18, 1987. The General Conference thought the response, which was in letter form, did not comply with the rules, and notified the defendants that it would give them an extension, until June 15, 1987, to file an amended answer. No amended answer was filed by that deadline.

On July 15, 1987, the General Conference filed a motion for judgment on the pleadings, or in the alternative, a motion to strike the answer of Marik and the Congregational Church. A hearing on the motion was scheduled for September 8, 1987. On August 4, 1987, the defendants filed a "Denial of Plaintiff's Allegations." Pursuant to local rule, a scheduling conference was held August 10, 1987, before a magistrate. The magistrate advised Marik that the Congregational Church was an eleemosynary corporation and could not be represented pro se, and advised the Congregational Church to obtain legal counsel. The court continued the conference for that purpose.

The defendants filed no response to the motion for judgment on the pleadings. Because it received no opposition to the motion, the court ordered that judgment on the pleadings be granted, and denied the motion to strike. The judgment and a permanent injunction were entered December 8, 1987. The injunction prohibits the defendants from using a name that includes the term "Seventh-Day Adventist" or "SDA," or promoting or representing to others that it is connected in any way with the General Conference. It also required the defendants to file a compliance report with the court within 30 days.

On December 28, 1987, the defendants, now represented by counsel, filed a motion for suspension of the injunction, a motion to set aside the judgment, and other related motions. On January 12, 1988, Marik and the Congregational Church filed a compliance report that stated that they refused to comply with the injunction because they believed the judgment was void for lack of subject matter jurisdiction, and because plaintiff's trademark was invalid. The General Conference re-

sponded with a motion to show cause why the defendants should not be held in contempt.

The district court denied defendants' motion to set aside the judgment, stating that the question whether "Seventh-Day Adventist" was a generic mark was one of law that had been decided in the judgment on the pleadings, and there was no reason to revisit the question upon a motion for new trial. The defendants filed a notice of appeal on April 7, 1988. The district court then entered an order to show cause why defendants should not be held in contempt, and set a hearing for May 9, 1988. The district court held both Marik and the Congregational Church in contempt, set a fine of \$500 per day until compliance against both defendants, individually and collectively, and ordered that a warrant issue for Marik's arrest until full compliance with the injunction. The court also awarded plaintiff \$13,929.21 for attorneys' fees and costs incurred in pursuing the contempt order.

## DISCUSSION

[1] A judgment on the pleadings is a decision on the merits, and we review it *de novo*. See *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988). Judgment on the pleadings is proper when there are no issues of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 12(c). All allegations of fact by the party opposing the motion are accepted as true, and are construed in the light most favorable to that party. *McGlinchy*, 845 F.2d at 810. As a result, a plaintiff is not entitled to judgment on the pleadings when the answer raises issues of fact that, if proved, would defeat recovery. Similarly, if the defendant raises an affirmative defense in his answer it will usually bar judgment on the pleadings. See 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1368 (1969).

[2] The defendants filed two pleadings that the district court construed as "Answers." If we construe these "answers" liberally because Marik had submitted them pro se,<sup>1</sup> see *United States v. Ten Thousand Dollars (\$10,000) in U.S. Currency*, 860 F.2d 1511, 1513 (9th Cir. 1988), they set forth two points that either raise questions of material fact, or present affirmative defenses. In the same permissive mode, the second "answer" filed after the motion for judgment on the pleadings, may be construed as an opposition to the motion. For these reasons, judgment on the pleadings was improper.

*A. Is "Seventh Day Adventist" a Generic Term?*

A trademark, even if it has become incontestable, is subject to the defense that the mark is generic. *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194-95 (1985). A trademark's function is to identify and distinguish the goods or services of one seller from another. 1. J. McCarthy, *Trademarks and Unfair Competition* § 12.1 (2d ed. 1984). A generic mark is one that tells the buyer what the product is, rather than from where, or whom, it came. *Id.* A generic mark cannot be subject to trademark protection because it does not indicate the product or service's origin, but is the term for the product or service itself. *Id.*

[3] The defendants claim that the name "Seventh Day Adventist" is generic: it refers to a religion, rather than the church organization. See *Christian Science Bd. of Directors v. Evans*, 105 N.J. 297, 520 A.2d 1347 (1987). Marik discussed the generic nature of the church name in his "Answers." Construing the "Answers" liberally, we find that Marik sufficiently raised the issue as an affirmative defense when he stated:

---

<sup>1</sup>Marik purported to answer for his church, an eleemosynary corporation. Not being an attorney, he could not answer for the church. The district court did not strike the answer, however. The church was represented by counsel by the time of its motion for new trial.

The phrase "Seventh-day Adventist" is not theirs alone, as they would like to claim, for it describes a system or set of Bible based christian beliefs, doctrines [sic], and standards. One, therefore, is not necessarily a Seventh-day Adventist because of what organization he may be affiliated with, but rather, he is a Seventh-day Adventist because of what he believes. Seventh-day Adventism is a particular faith, and those that conscientiously hold to that faith are Seventh-day Adventists. For an example, there are many different "Baptist" churches, but they all have a very similar faith.

Even assuming everything the General Conference alleges is true, the defendants are not liable for trademark infringement if they prove that the mark is generic. Because this defense was raised in the answer, it bars a judgment on the pleadings.

#### B. *Likelihood of Confusion*

To establish trademark infringement, the plaintiff must prove that there is a likelihood of confusion from the defendant's use of a mark similar to plaintiff's. *See* 15 U.S.C. § 1114; *Century 21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175, 1178 (9th Cir. 1988). Several factors are involved in determining likelihood of confusion, which is a question of fact. *See id.* at 1178-79; *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1355 (9th Cir. 1985) (*en banc*). These factors include: 1) the strength of the plaintiff's mark/name; 2) the proximity of the parties' goods; 3) similarity of the marks/names; 4) evidence of actual confusion; 5) marketing channels used; 6) likely degree of purchaser care; 7) defendant's intent in selecting the mark/name; and 8) likelihood of expansion of product lines. *Accuride Int'l, Inc. v. Accuride Corp.*, 871 F.2d 1531, 1533-34 (9th Cir. 1989).

[4] In the "Answers," Marik makes several factual assertions regarding the likelihood of confusion. First, he notes that the



Congregational Church has "never in any way sought to deceive or confuse any one in regards to our name." He also states that the word "congregational" in the name of his church is explanatory, and distinguishes the two different churches. He states that "people have been quick to recognize this," and that the church intentionally used the word "congregational" to clarify that they were not affiliated with the plaintiff. All of these factual allegations go to the issue of likelihood of confusion, and create a question of material fact that should not have been determined in a judgment on the pleadings.

### *C. Other Matters*

Defendants attempt to challenge the order of the district court holding them in contempt. That order was entered, however, after the notice of appeal was filed. The order appealed from was not stayed. The notice of appeal stated that the appeal was from the judgment and injunction entered on December 8, 1987, and from the order denying new trial entered on March 16, 1988. It does not bring before us the later contempt order, and we decline to rule upon it. Further relief, if any, must come from the district court.

Because the contempt order is not before us, we deny the motion to supplement the record on appeal with the record of the contempt proceedings. We also deny, as not in compliance with Fed. R. Evid. 201, defendants' motion to take judicial notice of certain "adjudicative facts."

Remaining points urged by the defendants are without merit.



## CONCLUSION

The judgment on the pleadings in favor of plaintiff is **REVERSED**, and the cause is **REMANDED** to the district court for further proceedings.

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*Attorney for Defendants*

IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF HAWAII

GENERAL CONFERENCE	§	CIVIL ACTION NO. 87 0274
CORPORATION OF	§	
SEVENTH-DAY ADVENTISTS,	§	NOTICE OF APPEAL FROM A
	§	JUDGMENT AND/OR ORDER
<i>Plaintiff,</i>	§	OF A DISTRICT COURT TO
	§	A COURT OF APPEALS
SEVENTH-DAY ADVENTIST	§	
CONGREGATIONAL	§	
CHURCH and JOHN R.	§	
MARIK,	§	
	§	
<i>Defendants.</i>	§	
	§	

---

22

**NOTICE OF APPEAL FROM A JUDGMENT AND/OR  
ORDER OF A DISTRICT COURT TO A COURT OF APPEALS**

**NOTICE OF APPEAL**

Notice is hereby given that the Seventh-day Adventist Congregational Church and John R. Marik, Defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from Judgment and Permanent Injunction entered in this action on December 8, 1987, and from Order entered in this action on March 16, 1988, denying Defendants' Motion to Set Aside Judgment, to Dismiss or for New Trial, for a More Definite Statement, and to Strike Under FRCP 59 and FRCP 12.

DATED: Houston, Texas, April 5, 1988.

Respectfully submitted,

Max A. Corbett  
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Houston, Texas 77069  
(713) 444-2340  
*Attorney for Defendants*

NO. 88-2506

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

GENERAL CONFERENCE CORPORATION OF  
SEVENTH-DAY ADVENTISTS,

*Plaintiff-Appellee,*

vs.

SEVENTH-DAY ADVENTIST CONGREGATIONAL  
CHURCH and JOHN R. MARIK

*Defendants-Appellants*

APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF HAWAII

BRIEF FOR APPELLANTS

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*Attorney for Appellants*

560 F.2d 561 (C.A. 3, 1977); *Avoyelles Sportmen's League, Inc.-v. Marsh*, 715 F.2d 897 (C.A. 5, 1983). Additionally, the order of the Court on March 16, 1988, was res judicata as to issues before the Court. *American Surety Co. v. Baldwin*, 287 U.S. 156, 77 L.Ed 231, 53 S.Ct 98 (1932), 86 ALR 29. Cited with approval in *Ins. Corp. of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694, 706, 707, 72 L.Ed.2d 492, 504, 102 S.Ct 2099, 2106 (1982). Accordingly, the order to show cause should have been vacated on motion therefor.

#### **5.7.2.7 Procedural Due Process**

In the hearing held on May 9, 1988, pursuant to Order to Show Cause Why Defendants Should Not Be Held in Contempt, an offer was made to present evidence why Defendants were not in contempt, and such offer was refused, and exception duly made and noted. This is a denial of procedural due process. In *Cooke v. United States*, 267 U.S. 517, 537, 69 L.Ed 767, 774, 45 S.Ct 390, 395 (1925) the Court held: "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation." This case was followed in *United States v. Lumumba*, 741 F.2d 12 (C.A. 2, 1984). See *Civil and Criminal Contempt*, 73 Harvard Law Review 333 (1959).

#### **5.7.2.8 Laches**

A number of Seventh-day Adventists have been disfellowshipped from time to time because of refusal to follow the hierarchy of the church. These disfellowshipped ones have formed their own churches bearing the name Seventh-day

NO. 88-2506

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

GENERAL CONFERENCE CORPORATION OF  
SEVENTH-DAY ADVENTISTS,

*Plaintiff-Appellee,*

vs.

SEVENTH-DAY ADVENTIST CONGREGATIONAL  
CHURCH and JOHN R. MARIK

*Defendants-Appellants.*

APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF HAWAII

REPLY BRIEF OF APPELLANTS

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### 2.7.2 Procedural Due Process

In a civil contempt proceeding the introduction of evidence is proper in regard to the issue of inability to comply with a judgment or order of the Court. *Donovan v. Mazzola*, 761 F.2d 1411 (C.A. 9, 1985). The introduction of evidence is also permissible with regard to other issues. One such issue is the matter of subject matter jurisdiction where there has been an actual contest of such issue. *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 84 L.Ed 329, 60 S.Ct 317 (1940), noted 1940, 28 Geo.L.J. 1006, 53 Harv.L.Rev. 652, 49 Yale L.J. 959; *Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487 (C.A. D.C. 1984). An offer was made in the May 9, 1988, hearing to present evidence, including that related to this specific issue. When the jurisdiction of a federal court is questioned, the court has the power and duty to determine the jurisdictional issue. *Familia de Boom v. Arosa Mercantil, S.A.*, 629 F.2d 1134 (C.A. 5, 1980), cert den 451 U.S. 1008, 60 L.Ed.2d 861, 101 S.Ct 2345; *Thornhill Publishing Co. v. General Tel. & Electronics Corp.*, 594 F.2d 730 (C.A. 9, 1979). A failure to provide Appellants with proper notice and an opportunity to be heard is subject to collateral attack. *Wuchter v. Pizzutti*, 276 U.S. 13, 72 L.Ed 446, 48 S.Ct 259, 57 A.L.R. 1230 (1928). "Notice" and "power" are inseparable aspects of due process requirements. *Pennoyer v. Neff*, 5 Otto (95 U.S.) 714, 24 L.Ed 565 (1877).

Accordingly, there has been a denial of procedural due process.

### 2.7.3 Laches

The doctrine of laches, that is, the inexcusable



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ATTORNEY AT LAW  
5902 BERMUDA DUNES  
HOUSTON, TEXAS 77069

January 12, 1990

TELEPHONE  
(713) 444-2840

Chief Judge Harold M. Fong  
United States District Court  
for the District of Hawaii  
300 Ala Moana Boulevard  
Honolulu, Hawaii 96813

Re: General Conference Corporation of Seventh-day Adventists,  
Plaintiff, v. Seventh-day Adventist Congregational Church  
and John R. Marik, Defendants, U.S. Hawaii District Court  
No. 87-0274, U.S. Ninth Circuit Court of Appeals No. 88-  
2506, U.S. Supreme Court No. 89-1061.

Dear Chief Judge Fong:

I am in receipt of letter addressed to you dated January 8, 1990, of Ms. Lorraine H. Akiba, Attorney for Plaintiff in the referenced case.

You are advised that a Petition for Writ of Certiorari was filed in the referenced case with the United States Supreme Court on December 29, 1989. A copy of such Petition for Writ of Certiorari is enclosed. Your attention is particularly directed to Section 6.4 of such Petition entitled: THE COURT BELOW HAS ERRED IN NOT HOLDING THAT THE CONTEMPT ORDER OF THE DISTRICT COURT WAS BEFORE THE COURT FOR DECISION, AND THAT SUCH ORDER WAS VOID AND OF NO FORCE AND EFFECT, AND ORDERING A RECISION OF THE WARRANT FOR ARREST OF JOHN R. MARIK. In other words, I decidedly differ in opinion with Ms. Akiba, for she concludes that I "did not properly appeal from the contempt order." It is also apparent that we differ considerably as to what "remaining issues" remain to be resolved - thus the necessity for filing the Petition in the first instance.

I appreciate the "humanitarian gesture" made by the General Conference but, a more "humanitarian gesture" would have been for them not to have trademarked the name "Seventh-day Adventist" in the first instance, for even one whom they consider to be a prophetess of God, Ellen G. White, said: "We are Seventh-day Adventists. Are we ashamed of our name? We answer, 'No, no! We are not. It is the name the Lord has given us.'" 2 Selected Messages 284. The defendants in this case consider themselves to be Seventh-day Adventists. How can they with a clear conscience before God abandon that name when it is God given. Harold, don't you believe you name is God given? Would you abandon it simply because someone contend that you no longer had a right to use it? Your understanding would be appreciated in the course taken to seek the best interests of this small persecuted group.

Very truly yours,

*Max A. Corbett*




SALESA AREA OFFICE 212-637-7575 HOLLAND ROAD, KENNESAW, GEORGIA 30144 TEL: 212-637-7575 FAX: 212-637-7575

Chief Judge Harold M. Fong  
January 8, 1990  
Page Two

The General Conference realizes that this matter is out of its hands, since the contempt order remains in effect and the Court retains jurisdiction to enforce its orders. However, as a humanitarian gesture, the General Conference has informed the Court of its position on this matter. Because the General Conference cannot do so on behalf of Mr. Marik, we would urge Mr. Corbett to take appropriate steps to seek relief for his client. We would also reiterate our support of Mr. Marik's release, should Mr. Corbett make such a request to the Court.

Very truly yours,



Lorraine H. Akiba

for

CADES SCHUTTE FLEMING & WRIGHT

cc: U.S. Marshall's Office,  
Inspector Larry Tice  
Max Corbett, Esq.



3  
No. 89-1061

IN THE SUPREME COURT  
OF THE UNITED STATES

OCTOBER TERM, 1989

SEVENTH-DAY ADVENTIST CONGREGATIONAL CHURCH  
AND JOHN R. MARIK,

Petitioners,

v.

GENERAL CONFERENCE CORPORATION  
OF SEVENTH-DAY ADVENTISTS,

Respondent.

---

ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

REPLY TO BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

---

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Supreme Court, U.S.  
FILED

FEB 13 1990

JOSEPH F. SPANIOLO, JR.  
CLERK



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No. 89-1061

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

SEVENTH-DAY ADVENTIST CONGREGATIONAL CHURCH  
AND JOHN R. MARIK,

Petitioners,

v.

GENERAL CONFERENCE CORPORATION  
OF SEVENTH-DAY ADVENTISTS,

Respondent.

---

ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

REPLY TO BRIEF IN OPPOSITION TO PETITION.  
FOR WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

---

Petitioners, Seventh-day Adventist Congregational Church and John R. Marik, respectfully affirm their request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, and thus present their reply to brief in opposition.

The Seventh-day Adventist Congregational Church has no parent or subsidiary company.

1. SUPPLEMENTAL STATEMENT OF THE CASE

The following supplemental statement of the case is offered in compliance with Rule 15 of the Court. The General Conference Corporation of Seventh-day Adventists ("Conference Corporation") was not the first legal user of the trade name, trademark, and service mark "Seventh-day Adventist." See page 3 of Respondent's Brief in Opposition. The Conference Corporation was not incorporated until 1904. The Conference Corporation is wholly owned, directly and/or indirectly by the General Conference of Seventh-day Adventists ("SDA Conference"), a legal entity which is non-incorporated. As indicated in Petitioners' Petition, first legal use of the name "Seventh-day Adventist" was made prior to the 1860 date set forth by Respondent.

At the hearing held before Judge Russell Smith on February 22, 1988, mentioned by Respondent (see page 4 of Brief in Opposition) there were five motions pending: (1) Petitioners' Motion to Set Aside Judgment, to Dismiss or for a New Trial, for a More Definitive Statement, and To Strike, (2) Petitioners' Motion for Suspension of Injunction and Order, (3) Respondent's Motion for Sanctions, (4) Petitioners' Motion for Sanctions, and (5) Motion for Order to Show Cause Why Defendants Should not Be Held in Contempt. Judge Russell Smith on March 16, 1988, held specifically: "The Motions are each and all DENIED." Page B-3 of Brief in Opposition. Note correspondence with Judge Fong set forth in Appendix A. Accordingly, when an Order to Show Cause Why Defendants Should not be Held in Contempt was entered on April 20, 1988, Defendants filed on May 9, 1988 a Motion to Vacate Order to Show Cause

Why Defendants Should Not be Held In Contempt and a supporting brief. In such motion it was clearly stated: "The matters set in issue by the Show Cause Order have been properly disposed of by this Court's Order filed March 16, 1988, and thus it is res judicata, and the Show Cause Order is improper and should be vacated." Res Judicata is a matter of procedural due process. Thus, the following statement of Respondent regarding procedural due process at page 6 of its Brief in Opposition is incorrect: "This was the first time the argument was made by Petitioners."

It is Respondent, not Petitioners, who have complicated the matter and delayed proceedings below. To illustrate: (1) It was the one to present a Motion for Judgment on the Pleadings, which resulted in an appeal to the Court of Appeals, and then a reversing and remanding, (2) It was the one to contend that Petitioners' Motion

to Set Aside and for other matters was untimely filed, and the District Court agreed with them, until Petitioners presented their Motion to Reconsider with numerous supporting cases, whereon Judge Russell Smith manfully admitted: "Initially I thought that the motions were untimely. I was wrong in that, and now address the merits of defendants' motions." See page B-2 of Respondent's Brief in Opposition. (3) It was the one who presented matters both in the District Court and in the Court of Appeals, which resulted in motions in both Courts that sanctions be imposed against them.

Though John R. Marik was released from custody on December 20, 1989, as mentioned by Respondent at page 6 of their brief, that has not ended the matter, for he is still subject to summons. Further, it was only when friends of his posted a \$25,000 bond on his behalf, that such release was



made possible. He, himself, did not have such funds. Further, he is presently restricted to a specified area within the state of California until summoned. That, in itself, is a great restriction on his freedom of movement.

## 2. SUMMARY OF ARGUMENT

The manner in which the Court of Appeals decision conflicts with and/or departs from federal law has been given in detail. A review of the federal cases cited in Petitioners' Table of Authorities in their Petition for Writ of Certiorari, and a notation of the argument of Petitioners with regard to these cases, refutes any statement to the contrary by Respondent. The cases cited by Petitioner glaringly stand in a manner adverse to the ruling of the Court of Appeals.

A remand of a case does not preclude it being proper for certiorari review. The contempt order was properly before the

Court of Appeals, contrary to assertions by Respondent.

Judicial notice is proper at any stage of the proceedings, including appeal. Certainly attention has not been called to "extrinsic and irrelevant facts" as contended by Respondent. They are of the essence. When it is considered that this case has come up on a Motion for Judgment on the Pleadings, it can not properly be contended, as does Respondent, that the Court is being requested "to determine facts de novo." See page 7 of Respondent's Brief.

### 3. ARGUMENT

3.1 The Court of Appeals Has Rendered a Decision In Conflict With The Decision of Another Federal Court Or Which So Far Departed From The Accepted And Usual Course of Judicial Proceedings.

The Court of Appeals specifically held: "Remaining points urged by defendants are

without merit." See page 3, and page App. -8- of Petitioners' Petition. Thus, the Court ruled against them on the following points: (1) that judicial notice of certain matters was appropriate, (2) that the name "Seventh-day Adventist" was generic, (3) that the case involved Freedom of Religion and Speech, (4) that the matter of establishment of a religion was involved, (5) that Respondent was the owner of the trademark "Seventh-day Adventist," (6) that indispensable parties had not been joined to the action, (7) that sanctions should have been imposed against Respondent, (8) that the Contempt Order was properly before the Court of Appeals for decision, (9) that excessive fines and cruel and unusual punishment had been inflicted, and (10) that there had been a deprivation of property without due process of law. Contrary to assertions by Respondent, the Court of Appeals decision, when viewed

overall, could not by any stretch of the imagination "be construed as favorable to Petitioners." See page 9 of Respondent's Brief. When the Court of Appeals held: "Remaining points urged by defendants are without merit.", it did make a determination as to the merits of the authorities cited in the Petition. It did in fact create law contrary to the authorities cited by Petitioners, contrary to assertion by Respondent. Thus, most assuredly this is a case where a court of appeals has rendered a decision in conflict with the decision of another federal court or so far departed from the usual course of judicial proceedings.

### 3.2 The Case is Proper for Certiorari

The case of Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Company, 389 U.S. 327, 19 L.Ed2d 560, 88 S.Ct 437 (1967) cited by Respondent actually supports the fact that this case

is proper for certiorari. In that case it should be particularly noted that the reason it was held "not yet ripe for review by this Court," was because the Court of Appeals "remanded to the District Court to consider whether there had in fact been a contempt," among other things. Ibid., page 328. As noted by the Court of Appeals in that case, "The union's response was a 'denial in full that we have committed any contempt whatever, in any way, of any order of this court, and secondly, that the outstanding order of this court is invalid.'" Brotherhood of Loc. Fire & Eng. v. Bangor & Aroostook R. Co., 380 F.2d 570, 574 (1967). In this case, as Respondent admits, and contends, Petitioners "(1) continued use of the General Conference's registered mark 'SEVENTH-DAY ADVENTIST' in connection with Defendant's church services and activities associated therewith; and (2) continued possession of a sign,

literature, and other SDACC produced materials bearing the name 'SEVENTH-DAY ADVENTIST' in violation of the Judgment and Permanent Injunction entered on December 8, 1987." See page 5 of Respondent's Brief.

The instant case is most definitely a proper one for certiorari.

It is not the prerogative of Respondent to dictate to Petitioners the course of action they should pursue to best protect their interests. As previously indicated, to follow the course of action they suggest would be to complicate matters and unduly burden the Courts.

3.3 The Court Should Review The Contempt Order Because That Order Was Properly Appealed, and Should Have Been Addressed By The Court of Appeals

Contrary to assertions by Respondent at pages 10 and 11 of its Brief, the Contempt Order was properly before the Court of Appeals. In addition to matters set forth

in Section 6.4 of the Petition, and as previously noted herein, Defendants filed on May 9, 1988, a Motion to Vacate Order to Show Cause Why Defendants Should Not be Held In Contempt and a supporting brief. In such motion it was clearly stated: "The matters set in issue by the Show Cause Order have been properly disposed of by this Court's Order filed March 16, 1988, and thus it is res judicata, and the Show Cause Order is improper and should be vacated." Res Judicata, being a matter of procedural due process, applicable to the main case, the matter was clearly before the Court of Appeals.

The footnote cited by Respondent in the case of Rogers v. Lodge, 458 U.S. 613, 628 n. 10, 73 L.Ed2d 1012, 102 S.Ct 3272 is set forth verbatim as follows: "Appellants contend that District Court should not have divided Burke County into five districts but should have allowed appellants to

devise a plan for subdividing the county and to submit their plan for preclearance under Sec. 5 of the Voting Rights Act, 79 Stat 439, as amended, 42 USC Sec. 1973c (42 USCS Sec. 1973c). This contention was not properly raised in the Court of Appeals and was not addressed in that court. We therefore do not address it. See *Adickes v. S.H. Kress & Co.*, 398 US 144, 147, n 2, 26 L Ed 2d 142, 90 S Ct 1598 (1970)." Thus, such case stands for the proposition only that in that case under its facts, the Court would not address an issue not raised previously. In this regard, the comment of the Court in *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-258, 60 L.ed 629, 36 S.Ct 269 (1916) should be noted: "It is contended that this question is settled otherwise, at least as between these parties, by the decision of the circuit court of appeals on the first appeal, and our refusal to review that



decision upon complaint's petition for writ of certiorari, and that the only questions open for review at this time are those that were before the court of appeals upon the second appeal. This, however, is based upon an erroneous view of the nature of our jurisdiction to review the judgments and decrees of the circuit court of appeals by certiorari under Sec. 240, Judicial Code [36 Stat. at L. 1157, chap. 231], derived from Sec. 6 of the Evarts act of March 3, 1891, 26 Stat. at L. 828, chap. 517, Comp. Stat. 1913, Sec. 1217."

The Respondent has a misconception of the holding in the case of Halderman v. Pennhurst State School & Hospital, 673 F.2d 628 (C.A. 3, 1982) for such Court states at page 636: "For civil contempt orders the settled rule is that, when directed against parties, such orders are interlocutory and unreviewable except incident to an appeal from a judgment otherwise appealable.", and

citing cases. (emphasis added). Black's Law Dictionary, Fifth Ed., defines "incident" thusly: "When used as a noun, it denotes anything which inseparably belongs to, or is connected with, or inherent in, another thing, called the 'principal.'"

Other cases noted by Petitioners likewise hold: "If the order is one for civil contempt, a party may appeal the contempt issue as part of any appeal from the final judgment." *Union of Prof. Airmen v. Alaska Aeronautical*, 625 F.2d 881, 883 (C.A. 9, 1980). "'[A] civil contempt proceeding is in effect a continuation of the main action and therefore a party to a suit may not review upon appeal an order fining or imprisoning him for civil contempt except in connection with appeal from a final judgment in the main action.' *Wright, Civil and Criminal Contempt in the Federal Courts*, 17 F.R.D. 167, 176 (1955)." *Carbon*

Fuel Co. v United Mine Workers of Amer., 517 F.2d 1348,1349 (C.A. 4, 1975). "[A] civil contempt order issued against a party lacks the requisite finality because its validity can be tested by an appeal from the final judgment. Fox v. Capital Co., supra; Developments in the Law - Discovery, 74 Har.L.Rev. 940, 996 (1961)." Southern Railway Company v. Lanham, 403 F.2d 119, 124 (C.A. 5, 1968). "The merits of the contempt order against a party can be challenged on appeal from a final judgment to the extent the order affects the judgment or carries with it collateral legal consequences." United States v. Johnson, 801 F.2d 597,599 (C.A. 2, 1986).

The matters above noted declare most eloquently that this Court should review the Contempt Order.

3.4 Judicial Notice of Facts Specified by Petitioners is Proper

The rule of judicial notice applies to

appellate courts, and they will generally take judicial notice of any matter which the court below could have judicially noticed. United States v. Pink, 315 U.S. 203, 86 L.Ed 796, 69 S.Ct 552 (1942); Massachusetts v. Westcott, 431 U.S. 322, 52 L.Ed 349, 97 S.Ct 1755 (1977); United States v. Dolan, 544 F.2d 1219 (C.A.4, 1976).

Under consideration in New York, NH&H Railroad Co. First Mortgage 4% Bondholders Committee v. United States, 399 U.S. 392, 435, 26 L.Ed2d 691, 90 S.Ct 2054 (1970) cited by Respondent at page 13 of its Brief was the "fair liquidation value" of the railroad undergoing reorganization, which was held by the reorganization court to be "property's highest and best use." In Re New York, New Haven and Hartford Railroad Co., 304 F.Supp. 739,799 (D.C. Conn., 1969). Such indeed would involve "myriad factual and legal issues." New York, NH &

H Railroad Co. First Mortgage 4%  
Bondholders Committee v. United States, 399  
U.S. 392, 435 (1970). Such is not the case  
here. The facts set forth for Judicial  
Notice are, relatively speaking, extremely  
limited.

The Court is requested in accordance with  
the provisions of Rule 201(d) of the  
Federal Rules of Evidence (hereafter "FRE")  
to take judicial notice of the adjudicative  
facts set forth in the Petition for Writ of  
Certiorari, and particularly as they are  
set forth in Dictionaries, Encyclopedias,  
Bible, and other media referenced therein.  
FRE 201(f) specifies: "Judicial notice may  
be taken at any stage of the proceeding."

The review requested by Petitioners is  
proper.

3.5 Certiorari Review Of The Court  
of Appeals' Refusal To Take Judicial Notice  
Is Proper

As noted previously, judicial notice may

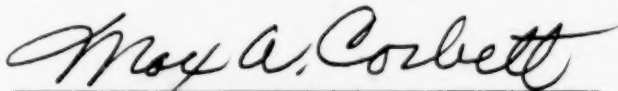
be taken by appellate courts. FRE 201(d) was invoked in the Court of Appeals. A review by this Court of the Court of Appeals handling of judicial notice is proper.

When the basis for the rule of judicial notice is considered, that of eliminating unnecessary legal proceedings for the presentation of evidence, it is salutary that the Court consider the matters pertaining to judicial notice in this case.

#### 4. CONCLUSION

For the reasons stated above the writ of certiorari should issue to review the decision of the Court of Appeals of the Ninth Circuit.

Respectfully submitted,



Max A. Corbett  
5902 Bermuda Dunes  
Houston, Texas 77069  
(713) 444 2840

Attorney for Petitioners

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**HAND DELIVER**

Re: General Conference Corporation of Seventh-Day  
Adventists v. Seventh-Day Adventist  
Congregational Church, et al.; Civil No. 87-274

I am writing to request that the above-referenced litigation be assigned to one of the local district court judges. Two different visiting judges have heard motions in this case and we are experiencing great difficulty in the administrative management of the case, i.e. having orders entered in a timely manner and having to re-brief each succeeding visiting judge on the case history and status. The Honorable Roger D. Foley heard motions filed in mid-1987 and the Honorable Russell Smith heard motions recently filed in this case.

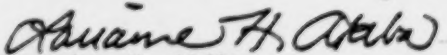
Because of the problems presented by Defendants' ongoing contempt of the Court's Judgment and Permanent Injunction, we anticipate further hearings and the need for expeditious review and action by the Court. At present, we are still awaiting the issuance of an order to show cause by the Court so an appropriate contempt order may be entered and sanctions imposed against Defendants and their counsel for non-compliance with the judgment and permanent injunction.

To save judicial resources and time, I would like to request that one of the local district court judges be assigned to this case. I would also like to take this opportunity to request that a settlement conference be scheduled with the assigned judge pursuant to LR 240.

The Honorable Harold M. Fong  
March 22, 1988  
Page 2

Thank you for your consideration of this matter.

Very truly yours,

  
Lorraine H. Akiba  
for

CADES SCHUTTE FLEMING & WRIGHT

cc: Max A. Corbett, Esq. (certified mail/return receipt requested)  
Vincent L. Ramik, Esq.  
Richard W. Johns, Esq.  
bcc: Thomas E. Wetmore, Esq.  
RAV



MAX A. CORBETT

ATTORNEY AT LAW  
1902 BERMUDA DUNES  
HOUSTON, TEXAS 77069

March 25, 1988

TELEPHONE:  
(713) 444-2340

The Honorable Harold M. Fong  
Chief Judge  
United States District Court  
District of Hawaii  
300 Ala Moana Boulevard  
Honolulu, Hawaii 96850

Re: Civil Action No. 87 0274, General Conference Corporation  
of Seventh-day Adventists vs. Seventh-day Adventist  
Congregational Church and John R. Marik

Dear Judge Fong:

I am in receipt of letter dated March 22, 1988,  
addressed to you from attorneys for plaintiff in the  
referenced cause of action, relating to the disposition of  
matters in such case, copy attached.

The real issue in this case is whether the Court had  
jurisdiction in the first instance to enter the judgment that  
it did. Basically, this is a trademark infringement action.  
The sole fact to show such infringement, is the usage by  
defendants of a church sign announcing its place of worship  
and inviting those so inclined, to join in worship services.  
The church sign reads: "Seventh-day Adventist Congregational  
Church." Plaintiff has a trademark of the name "Seventh-day  
Adventist."

Any suit for infringement under the Lanham Act which  
relates to trademarks is dependent upon a showing of some  
commercial activity. Absolutely none has been shown. Also  
to be considered in any such suit is whether one's rights  
under the United States Constitution of freedom of religion  
and freedom of speech gives him the right to the use of a  
sign with a name which is intricately interwoven with such  
religion, as is the case here. Other substantive issues  
relating to jurisdiction are also present.

This is a suit of tremendous import, for if the judgment  
is not overturned on appeal, it will open the door for mass  
persecution because of one's religion, be it what it may,  
Christian, Buddhist, Moslem, Hinduism, etc.

Note Judge Smith's order denying Defendants' Motion to Set Aside Judgment, to Dismiss or for New Trial, for a More Definite Statement, and to Strike entered on March 16, 1988. His comment in hearing of such motion on February 22, 1987, is cogent: "The plaintiff here has won a victory in court. But I am not sure that if you pursue this victory it isn't going to be a pyrrhic one." (Transcript, p. 39, lines 17-19.). "The plaintiff is a conference of a religious group which has certain beliefs which are reasonably unique. The defendant is likewise a religious group which has very similar, if not identical, beliefs. And we have here a struggle between those two religious groups." (Transcript, p. 39, line 25, p. 40, lines 1-4). In such order of Judge Russell E. Smith entered on March 16, 1988 it is specifically stated: "The motion for sanctions is Denied, without prejudice. The problem of sanctions can be considered after the judgment has become final on appeal." (Page 4 of Order). There were three motions for sanctions pending before the Court, one by defendants (see page 1 of Defendants' Memorandum in Support of Defendants' Motion to Set Aside Judgment, to Dismiss or for New Trial, for a More Definite Statement, and to Strike Under FRCP 59 and FRCP 12), and two by plaintiff (See page 2 of Plaintiff's Memorandum in Opposition to Defendants' Motion for Suspension of Injunction and Order Pending Hearing and Ruling on Motion to Set Aside Judgment, to Dismiss or for New Trial, for a More Definite Statement and to Strike Under FRCP 59 and FRCP 12, and also Plaintiff's Motion for Order to Show Cause Why Defendants Should Not be Held in Contempt Because of Defendants' Violation of Judgment and Permanent Injunction.). Thus, Judge Smith has suspended the imposition of sanctions in all areas until "after the judgment has become final on appeal." There has been final disposition by the District Court "of all claims with respect to all parties" as must be noted under Local Rule 13(b)(1)C. of the Ninth Circuit Court of Appeals.

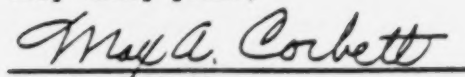
Accordingly, defendants disagree with the contention of plaintiff's attorneys that a further order is required with regard to the matter of contempt. There has been proper disposition of this matter.

Instead of saving judicial resources and time, to follow the recommendations of plaintiff's attorneys as set forth in their letter to you dated March 22, 1988, will have just the opposite effect.

Though defendants would have preferred that Judge Russell E. Smith had granted their motion to set aside judgment, to dismiss or for a new trial, they will agree that it took the wisdom of Solomon to formulate the order he rendered.

Your consideration of this matter is deeply appreciated.  
Thank you.

Very truly yours,

  
Max A. Corbett

cc: Roy A. Vitousek, III  
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